(10)

No. 96-126-CFX Title: Walker L. Chandler, et al., Petitioners
v.
Zell D. Miller, Governor of Georgia, et al.

Docketed: July 24, 1996 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 15 1996	Petition for writ of certiorari filed. (Response due August 23, 1996)
	Aug 19 1996	Brief of respondents Zell Miller, et al. in opposition filed.
	Sep 4 1996	DISTRIBUTED. September 30, 1996
	Oct 1 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply. SET FOR ARGUMENT January 14, 1997. **********
	Nov 12 1996	Joint appendix filed.
	Nov 12 1996	Brief of petitioners Walker Chandler, et al. filed.
	Nov 12 1996	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Nov 25 1996	CIRCULATED.
	Dec 10 1996	Brief of respondents Zell Miller, Louis Massey, and James G. Ledbetter filed.
	Dec 10 1996	Brief amicus curiae of United States filed.
	Dec 10 1996	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 12 1996	Motion of petitioners to allow American Civil Liberties Union, et al. to participate in oral argument as amici curiae and for divided argument filed.
	Dec 24 1996	Motion of petitioners to allow American Civil Liberties Union, et al. to participate in oral argument as amici curiae and for divided argument DENIED.
	Dec 27 1996	Reply brief of petitioner Walker Chandler, Sharon Harris, and James Walker filed.
	Jan 13 1997	Record filed.
	Jan 13 1997	Record filed.
	Jan 14 1997	ARGUED.

1pp

Supreme Court, U.S.
FILED

96 126 JUL 15 1996

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

WALKER L. CHANDLER

SHARON T. HARRIS

JAMES D. WALKER

Petitioners

VS.

HONORABLE ZELL D. MILLER

MAX CLELAND

JAMES G. LEDBETTER

Respondents.

On Petition for A Writ Of Certiorari

To the United States Court Of Appeals

For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Walker L. Chandler
Counsel of Record
Robert E. Turner
Attorney for Petitioners
Walker L. Chandler, Sharon T. Harris and James D. Walker

120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
770-567-3882 Telephone
770-567-0225 facsimile

★

80 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Georgia O.C.G.A. § 21-2-140, that allows suspicionless searches of candidates for political office, violate the Forth Amendment under the guidelines set out in *Von Raab*.

2. Is the establishment of such a drug-testing scheme as is set forth in O.C.G.A. § 21-2-140 a content-based restriction on free expression as well as an unconstitutional restriction upon the rights of voters to chose their elected officials, thus, violating the First Amendment of the U.S. Constitution?

LIST OF ALL PARTIES TO THE PROCEEDINGS

All Parties are named in the caption.

There is no parent or subsidiary company to be listed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

LIST OF ALL PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS..... iii-iv

TABLE OF AUTHORITIES..... v-vi

INTRODUCTORY PRAYER..... 2

CITATIONS TO OPINIONS BELOW 2

STATEMENT OF JURISDICTION..... 2

U.S. CONSTITUTION PROVISIONS..... 3

STATUTORY PROVISIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 4

A. FACTUAL BACKGROUND..... 4

B. BASIS OF JURISDICTION IN FIRST INSTANCE..... 5

REASONS FOR GRANTING OF WRIT..... 6

I. The decision of Court of Appeals is in conflict with the Supreme Court as to the applicable analysis of the federal

constitutional right to be free from suspicionless search as set out in *Von Raab* and other related cases.

A. An important governmental interest and a narrowly tailored statute designed to fit the requirements of the governmental interest are required before suspicionless searches are allowed so as to be tolerated by the Fourth Amendment.

B. Georgia Code § 21-2-140 was not drafted for a compelling or important government need, but was merely designed for the purpose of placating the electorate for placing an unconstitutional burden on government employees with the unconstitutional O.C.G.A. § 45-20-90.

II. The drug testing scheme violates the First Amendment in its effect of establishing a certain ideology as a qualification for holding public office, thus resulting in content based restriction on free speech. Such restriction is abhorrent to the First Amendment.

III. O.C.G.A. § 21-2-140 violates the Thirteenth Amendment and the equal protection clause of the Fourteenth Amendment.

CONCLUSION.....22

TABLE OF AUTHORITIES

CASES CITED:

Chandler, et al v. Miller, 73 F.3d 1543 (11th Cir. 1995) 3,8,9,11,14,15,16,18,19,21

Georgia Association of Educators v. Harris, 749 F.Supp. 1110 (1990).....v,4,14,15,16

Georgia Association of Educators v. Harris, 749 F.Supp.1110 (1990).....v, 2,3

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 689(1989).....v,4,6,8,9,11,12,13

Vernonia School District 47J v. Acton, __U.S.____, 115 S. Ct. 2386(1995).....v,5,9,13

Bond v. Floyd , 385 U.S. 116, 87 S.Ct. 339, 17 L. Ed. 2d 235 (1966).....v,19

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct 1402 (1989) ..... v, 5,8,11

STATUTES

O.C.G.A.§21-2140 1,2,3,4

O.C.G.A.§45-2090 3

LAW REVIEW ARTICLE

Edith Shine Legislative Review,9 Ga. St. U.L. Rev.212,218 (1992) 15, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

_____

No. _____

_____

WALKER L. CHANDLER; SHARON T. HARRIS; JAMES D. WALKER

Petitioners,

versus

ZELL D. MILLER, Governor; MAX CLELAND, Secretary of State; JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia,

Respondents

_____

PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Appellants Walker L. Chandler; Sharon T. Harris; and James D. Walker pray this Court to grant their petition for certiorari to review an adverse decision by the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 73 F.3d 1543.

The decision of the United States District Court in the Northern District of Georgia is an unreported decision.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1996, The Court of Appeals denied petition for rehearing on April 26, 1996.. This Court has jurisdiction to issue the requested writ of certiorari

under 28 U.S.C. 1254(1) because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the Eleventh Circuit. .

US CONSTITUTIONAL PROVISIONS

U.S. Constitution,

First Amendment - Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment - Unreasonable searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported By Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. 21-2-140 O.C.G.A. 21-20-90

STATEMENT OF CASE

A. Factual Background

Plaintiffs-Appellants Walker Chandler, Sharon Harris, and James D. Walker respectfully petitioned for rehearing, and suggested rehearing en banc, of the panel decision in *Chandler, et al v. Miller*, 73 F.3d 1543 (11th Cir. 1995) which was denied on April 18, 1996.

In May of 1994, and prior to filing their notices of candidacy for statewide political office and their "drug-free" certificates and paying their qualifying fees, plaintiffs filed this action in the district court. Therein they challenged the constitutionality of the O.C.G.A. § 21-2-140 requirement that they submit certificates showing that they had submitted to urine testing and that such testing had proved negative for the presence of illegal drugs.

After hearing oral argument, the district court issued an order (June 21, 1994) denying Plaintiff's motion for a

preliminary injunction. On January 31, 1995, the district court entered a consent order and final judgment incorporating its findings of law which it included in its order of June 21. Plaintiffs-Appellants appealed.

The three-judge panel of the eleventh circuit Court of appeals, in a 2-1 decision, affirmed the judgment of the district court. *Id.* The holding that the law requiring the suspicionless drug-testing of candidates does not violate either Fourth or First Amendment guarantees conflicts with the district court's ruling in *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110 (1990), as well as with the logic set forth by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 , 109 S.Ct 1402 (1989), and *Veronia School District 47J v. Acton*, ____U.S.____, 115 S. Ct. 2386 (1995).

B. Basis of Jurisdiction in the Court of First Instance.

28 U.S.C. 1331, 1243, 2201, 2202, and 42 U.S.C. 1983 et. seq.

REASONS FOR GRANTING THE PETITION

I. The decision of Court of Appeals is in conflict with the Supreme Court as to the applicable analysis of the federal constitutional right to be free from suspicionless search as set out in Von Raab and other related cases.

The case at bar is a case of first impression. While the analysis to this case and the general rule of law is set out in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989) and other cases, the Eleventh Circuit Court of Appeals in this case, unlike *Von Raab*, provides a constitutional ruling allowing the suspicionless search of a candidate for public office. This type of search goes well beyond suspicionless searches of: 1) government employees involved in drug interdiction, 2) public transportation employees where error on their part could result in great harm to many people, 3) minors held in a custodial environment subject to immediate danger, or 4) an important governmental interest that can not be served by ordinary methods of law enforcement. The Court has specified parameters under which a warrantless, suspicionless search is allowed. A compelling

or important governmental interest that can not be served by ordinary methods of law enforcement and a statute narrowly drawn to provide for the specific governmental interest are requirements of a warrantless, suspicionless search. These requirements have not been met in the case at bar.

A. An important governmental interest and a narrowly tailored statute designed to fit the requirements of the governmental interest are required before suspicionless searches are allowed so as to be tolerated by the Fourth Amendment.

Judge Barkett of the Eleventh Circuit states in her dissent,

> As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment unless it is required by 'special governmental needs

> beyond the normal need for law enforcement, and those needs outweigh the candidates' privacy interests.'

Chandler, et al v. Miller, 73 F.3d 1543,1549 (11th Cir. 1995), *quoting National Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91 (1989) *(citing Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1401, 1413-14 (1989). The Georgia statute, O.C.G.A. § 21-2-140, is a violation of the Fourth Amendment, and special circumstances are required for such a search to be allowed under the U.S. Constitution. As Judge Barkett states in her dissent, one of the overriding issues in this case is:

> [W]hether Fourth Amendment protections can be constitutionally suspended when there is no individualized suspicion, when there is no immediate or direct threat to public safety, when those being

> searched are not directly involved in the frontlines of drug interdiction, when there is no institutional setting involved such as a prison or public school requiring swift and informal discipline, and when there are no dire consequences as a result of waiting to obtain a warrant if a candidate, or anyone else for that matter, is suspected of violating the law.'

Chandler, 743 F.3d at 1550.

The Court has clearly found circumstances where searches that normally violate the Fourth Amendment can constitutionally proceed. The Court in *Von Raab* found there was an immediate or direct threat to public safety and that those being searched were directly involved in the frontlines of drug interdiction or carrying weapons, so that suspicionless searches were allowed. In *Veronia School District 47J v.*

Acton, ____ U.S. ___, 115 S.Ct. 2386 (1995) , again such searches were allowed where the Court found an institutional setting was involved such as a prison or public school requiring swift and informal discipline, and that dire consequences could occur as a result in waiting to obtain a warrant. But in the case at bar, no such dire consequences would result upon waiting to obtain a warrant if a candidate is suspected of violating the law. The panel majority in *Chandler*, found no special need in this situation that can not be served by ordinary law enforcement or the voting public. Judge Barkett states in her dissent,

> The majority frames its analysis in terms of whether 'unlawful drug use is . . . fundamentally incompatible with high state office.'

Chandler, 743 F.3d at 1550. While this statement may be true, the Georgia legislature or the panel majority fail to show that normal law enforcement methods will not serve any need required by the people and government of the candidate, and,

more to the point, they fail to show any special circumstance that justifies disregarding the political candidates constitutional rights. An important special governmental need must be present to encroach on the right guaranteed by the Fourth Amendment of the U.S. Constitution. See *Chandler*, 743 F.3d at 1550; *Von Raab*, 489 U.S. 656. Further, one could argue an important interest exists that voters should know whether candidates are in good health and intelligent, so that voters would know the candidates can serve their whole term in office and that they will not be distracted or adversely affected in doing their elected duty. The government could test candidates for aids, mental illness, other physical illness and intellectual capacity. If the circumstances in the case at bar are ones considered special circumstances that justify suspicionless searches, the next logical step is to test for drug and alcohol abuse of anyone associated with the government or any sort of activity where the person could potentially cause harm. Under this logic the Fourth Amendment has become meaningless.

In *Skinner*, 489 U.S. at 622, 631, 109 S.Ct. at 1419, 1420-21 (1989) , the court demonstrated a special governmental need

of railway safety and that ensuring this safety was beyond normal law enforcement, so suspicionless searches were allowed in this case. In *Skinner*, the work of government employees involved the "discharge of duties fraught with risks of injuries to others that even a momentary lapse of attention can have disastrous consequences.' *Id.* at 628, 109 S.Ct. at 1419. The Court in Skinner noted that this was a situation where drug and alcohol abuse were specifically related to serious train accidents proven in past railway history. Id. at. 606-608, 109 S.Ct. at 1407-08. The use of individualized suspicion was inadequate to prevent the great harm produced by railroad accidents. Id. at 622, 631, 109 S.Ct. at 1416, 1420-21.

Further, in *Von Raab*, 489 U.S. at 678-79, 109 S.Ct. at 1393, the Court allowed for the suspicionless urine testing for those involved directly in drug enforcement or those carrying firearms. The Court explicitly recognized the compelling reason for the suspicionless searches:

> A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals.

Von Raab, 489 U.S. at 670, 109 S.Ct. at 1393. The Court further recognized that "the public should not bear the risk that employees who may suffer from impaired perception or judgment who will be promoted to positions where they may need to employ deadly force." Id. at 671, 109 S.Ct. at 1393.

Finally, in *Veronia School District 47J v. Acton*, ___ U.S. ___, 115 S.Ct. 2386 (1995) the Court found a special government need in randomly testing school children and that testing was limited to athletes where these children could suffer immediate physical harm in their athletic activity. In this situation the Court allowed this encroachment on the Fourth Amendment by a statute that was narrowly tailored to children involved in athletics in a custodial situation where imminent harm was possible due to the activity within the custodial situation.

No such similar compelling or important government interests can be found in the present case, and any concern raised can be addressed by ordinary law enforcement. No such immediate threats exits in Chandler, similar to that in *Van Raab*, *Skinner*, or *Veronia*. The political candidates have a much greater expectation of privacy than someone involved in drug interdiction, railway transportation or children in a custodial setting subject to serious injury. If the voters are unhappy with the wall of privacy erected by a candidate, they may simply choose not to elect him. Even though a candidate may relinquish much of his or her privacy by choosing to run for political office, it should not include relinquishing one's 4th amendment right to be free from unreasonable

search. See Chandler, 73 F.3d at 1551. No problem exists as to normal law enforcement methods in serving this need. Therefore, no substantial need exist for encroachment on citizen and candidate's Forth Amendment right.

B. Georgia Code § 21-2-140 was not drafted for a compelling or important government need. It was adopted purely for symbolic reasons as companion legislation to O.C.G.A. § 45-20-90, held unconstitutional by this Court.

O.C.G.A. § 45-20-90, which required drug testing of all government employees and was struck down by the district court in Ga. Ass'n of Educators v. Harris, 749 F.Supp. 1110 (N.D. Ga. 1990), gave birth to O.C.G.A.§ 21-2-140 which is challenged here in a case of first impression. Clearly, the Georgia lawmakers, eager to prove themselves not above the impositions they so readily put upon others and eager to escape "drug test" challenges during elections, passed both laws. Chandler, 73 F.3d at 1552-53; Edith M. Shine Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992). As Judge Barkett's dissent states, "this search is more a symbolic gesture than an effective tool to ferret out drug-users or assure exemplary public officials. Surely symbolic gestures are not enough to trump the constitutional imperatives of the Fourth Amendment or the right to participate in government." *Chandler*, 73 F.3d at 1552-53. In striking down O.C.G.A. § 45-20-90, the court, in Ga. Ass'n, carefully read *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), and held,

inter alia, that,

> Defendant's position is untenable because neither *Von* Raab nor its progeny recognize such a generalized interest as sufficiently compelling to outweigh an individual's Fourth Amendment rights.

Ga. Ass'n., 749 F.Supp. at 1114.

The denial of individual liberty in the case at bar is no inconsequential matter:

> Not only is privacy surrounding an individual's bodily functions at stake in this case, but all the rights associated with participating in a democracy -- rights of association, freedom of speech, ballot access, and the right to cast an effective ballot. We are not dealing with the denial of job opportunity, but with our democratic form of Government.

Chandler, 73 F.3d at 1552. In light of the interference with the above named liberty interests, giving the governmental interests the greater

weight is especially unreasonable. To do so is to live in a world other than one in which the U.S. Constitution is the supreme law of the land.

II. The drug testing scheme violates the First Amendment in its effect of establishing a certain ideology as a qualification for holding public office, thus resulting in a content based restriction on free speech. Judge Barkett of the Eleventh Circuit clearly recognized the First Amendment problem, writing,

> The majority's justification for suspending the requirements of the Fourth Amendment is the state's interest in office holders who are "drug free," "honest[], clear sighted[], and clear thinking," as well as "ensuring that elected officials are 'persons appreciative of the perils of drug use' and '[] sympathetic to the interdiction efforts'

Chandler, 73 F.3d at 1550. Ironically, the panel majority has spelled out the reason why this statute violates the First Amendment, yet they still maintain that it is valid. The effect of the statute is to mandate what the political candidates are to think and believe. Judge Barkett writes:

> By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those who might disagree with the current policy of criminalizing drug use, but also those who challenge the intrusive governmental means to defeat such among its citizenry. This statute is neither neutral or procedural, but, in the majority's own characterization attempts to ensure only candidates with a

> certain point of view qualify for office.

Chandler, 73 F.3d at 1552.

The assertion that candidates must be appreciative of the perils of drug use and that they be sympathetic to interdiction efforts is similar to the logic which the General Assembly attempted to employ in its effort to keep Julian Bond from serving in the Georgia House of Representatives -- logic which was rejected in *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, (1966). Bond's speaking out against the war in Vietnam was characterized by the majority of the panel below as being "pure free speech". It could very well be said--as it was -- that Bond's utterances "gave aid and comfort to the enemy", and were thereby tantamount to treason. Libertarian candidates stand in the same position as Bond, in not endorsing a policy supported by those in the General Assembly. Similarly, the Libertarian Party's forthright stand against the failed "War on Drugs" and the widespread growth of governmental power and intrusiveness which has proliferated in its wake is well known. For Georgia politicians to attempt to have libertarian and limited-government candidates

tamely to submit to suspicionless drug testing is to attempt to force them to abandon their principles:

> Establishing a certain ideology as a 'qualification' for holding public office appears to be a content-based restriction on free expression.[5] Drug policy is a politically charged issue confronting many government officials who have disparate points of view regarding the 'Drug War' and the efficacy of the means employed in fighting it. It is the function of public office holders to write, enforce, and interpret the laws. By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not

> only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry.

Chandler, 73 F.3d at 1552.

This statute is patently offensive to the First Amendment. It strikes at the heart of our First Amendment protection: requiring a political candidate to adhere to a specific point of view -- a specific doctrine. The purpose of this statute has been shown clearly not to ferret out drug users or assure exemplary public officials, but merely for a symbolic measure. *Chandler*, 73 F.3d at 1552-53; Edith M. Shine Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992).

III. O.C.G.A. § 21-2-140 violates the Thirteenth Amendment and the equal protection clause of the Fourteenth Amendment.

O.C.G.A. § 21-2-140 is little more than a requirement to submit oneself to a badge of servitude as a prerequisite to seeking public office. It is constitutionally suspect under the Thirteenth Amendment, notwithstanding the fact that so many thousands of Georgians are willing to label themselves thusly as people willing to submit to the government's symbolic edict. That edict is also constitutionally suspect under the Fourteenth Amendment in that it purports to bar from office those who use illegal drugs--even if those drugs were taken in other states or other countries and were therefore not taken in violation of Georgia law. Similarly there is a serious Equal Protection question inherent in the fact that the alcohol-and-tobacco-using majority is attempting to decree that only those who use their drugs may even attempt to run for public office.

The synergistic effects of this statute in the unjustified violation of 1) an individual's Fourth Amendment right to free from unreasonable search, 2) the First Amendment rights of association and freedom of speech, and 3) the interference with the right of ballot access and to right to cast an effective ballot make Georgia Code Section 21-2-140 completely repugnant to the U.S. Constitution

CONCLUSION

Petitioner respectfully requests the Court to grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and reverse its decision.

Respectfully submitted,

Attorney for Petitioners

Walker L. Chandler,

Georgia Bar Number: 120675

(Counsel of Record)

Robert E. Turner

120 West Jackson Street

Post Office Box 7

Zebulon, Georgia 30295

office **1-770-567-3882**

facsimile **1-770-567-0225**

APPENDICES

In The United States Court Of Appeals

For The Eleventh Circuit

No. 95-8230

D. C. Docket No. 1:94-CV-1298-ODE

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER

Plaintiffs-Appellants,

versus

ZELL D. MILLER, Governor; MAX CLELAND,

Secretary of State; JAMES G. LEDBETTER,

Commissioner Department of Human

Resources State of Georgia,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 22, 1996)

Before Edmonson, DUBINA AND BARKETT, Circuit Judges.

EDMONSON, Circuit Judge:

In 1990, the Georgia legislature enacted O.C.G.A. § 21-2-1401 The offices to which the statute applies include, among others, those of the Governor, Lieutenant Governor, Secretary of State, Attorney General, the heads of several agencies, all state judges in courts of general jurisdiction, and all state legislators. Id. § 21-2-140 (a) (4). Plaintiff-appellants are members of the Libertarian Party seeking the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the House of Representatives.

As the language quoted in the margin indicates, anyone who declines to take the test, or who tests positive, is basically barred from holding office. Additional aspects of the drug-testing scheme were outlined by the district court: testing may, at the option of the candidate, be performed either at an approved medical testing laboratory or at the office of the candidate's physician.

Laboratory procedures concerning privacy follow the Mandatory Guidelines for Federal Workplace Drug Testing Programs, set out at 53 Fed. Reg. 11,979 (1988). The test is

designed to reveal the presence or absence of the indicia of five illegal drugs. No information unrelated to drug use is contemplated by the statute; the test simply indicates that the candidate tested positive or negative.

The appellants' arguments comprise three identifiable claims.[2] First, appellants argue the tests violate the Fourth Amendment prohibition on unreasonable searches and seizures. Second, appellants categorize the statute as affecting the Fourteenth Amendment rights of candidates to run and of voters to choose them. Third, they categorize their refusal to submit to the test as a protected speech act that cannot, under the First Amendment, be the basis for barring a candidate from the ballot.

II

That the tests at issue are searches within the meaning of the Fourth Amendment seems settled. See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). Like the test at issue in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d. 685 (1989), this test "is not designed to

serve the ordinary needs of law enforcement." 489 U.S. at 666; 109 S.Ct. at 1391. That is, the test is not designed to prosecute crime: no party before us contends otherwise. Special needs are involved. In this circumstance, the courts must "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U. S. at 665-66, 109 S.Ct. at 1390-91. Another federal appeals court considering suspicionless drug testing has noted that "Von Raab's balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others." Willner v. Thornburgh, 928 F.2d. 1185, 1187 (D.C. Cir. 1991).

No Federal Court seems to have entertained Fourth Amendment challenge to a state law requiring testing of candidates for high state office. Thus we observe at the outset the special concerns affecting the Von Raab balancing test where the state's interest is in setting qualifications for its own officers.

American history is especially important in a case like this one;

and the Supreme Court observed nearly a century ago:

> It is obviously essential to the independence of the States, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

Taylor v. Beckham, 178 U.S. 548, 570-72, 20 S.Ct. 890, 898, 44 L.Ed.2d 1187 (1900)' (cited in Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). In the light of this command, we regard the states as entitled to considerable deference in the characterization of their own interests.

Under the Skinner-Von Raab framework, the state's interest is calculated mainly by reference to two factors: the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position. In Skinner, the Court approved suspicionless drug testing where

there was a documented showing of widespread substance abuse among employees in the position to be subjected to testing. 489 U.S. at 607, 109 S.Ct. at 1407-08.

In Von Raab, the Customs office did not demonstrate a past of drug abuse among the employees to be tested. The Court approved the search anyway, however, when confronted with evidence that physical and ethical demands on customs agents were so great as to render drug use totally incompatible with the nature of the position. 489 U.S. at 669-70, 109 S.Ct. at 1393. Thus, because Georgia has not argued that her elected officials have in the past abused drugs, the issue on Georgia's interest is whether unlawful drug use is similarly fundamentally incompatible with high state office.

We think that to ask this question is also to answer it. The people of Georgia place in the trust of their elected officials that which people value most highly: their liberty, their safety, their economic well-being, ultimate responsibility for law enforcement, and so on. The Supreme Court has recognized that ":drug abuse is one of the most serious problems confronting our society today," Von Raab, 489 U.S. at 674, 109 S.Ct. at 1395, and

therefore has approved the drug testing of Customs officers in part because "the national interest (in eradicating drug use) could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." 489 U.S. at 670, 109 S.Ct. at 1393. That said, it follows, even more forcefully, that those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.[3]

But drug use poses significant dangers beyond rendering elected officials unsympathetic to drug interdiction efforts. The nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear thinking. For example, the Lieutenant Governor is the President of the Senate and has other executive duties posed by law; more important, though, the Lieutenant Governor is to replace the Governor should the top executive office become vacant. O.C.G.A. § 45-12-7. The Governor must respond to state emergencies, id. § 45-12-30, and if necessary call out the state militia. Id. § 45-12-27; 45-12-28. He can direct state law enforcement agencies. See O.C.G.A. §§ 35-3-8.1; 35-2-23(b). The Governor has broad powers of appointment to important offices, boards, commissions, and so

forth. See generally id. § 45-12-50; see also Ga. Const. Art. I., § 2, par. 1 (Governor appoints members of State Board of Pardons and Paroles). It goes without saying that clear judgment is imperative to the position. Likewise, members of the House of Representatives enact laws of general applicability for the state, while the Commissioner of Agriculture leads an agency with broad regulatory powers. See generally id. § 2-2-7 (Commissioner of Agriculture); Ga. Const. art. III (House of Representatives). The positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard." Von Raab, 4890 U.S. at 674, 109 S.Ct. at 1395. Simply put, the state's interest in filling these positions with drug-free people is great.[4]

Also, we note that our conclusion is strengthened by our deferential reading of Georgia's appraisal of its own interests. Evaluating the governmental interest is necessarily a policy-based inquiry; and while the importance of electing officials whose probity and judgment are unclouded by the use of unlawful drugs may be self-evident to us, we--whatever our own view might be--would be slow to disregard Georgia's appraisal of that need in the light of cases like Taylor, supra, reminding us that a state's

sovereign interests are at stake.

Against Georgia's interests must be balanced plaintiff-appellants' privacy interests. The Supreme Court in Skinner, 489 U.S. at 626, 109 S.Ct. at 1418, noted that drug tests "require employees to perform an excretory function traditionally shielded by great privacy," and Justice Scalia wrote in Von Raab that the drug tests there were "particularly destructive of privacy and offensive to personal dignity." 489 U.S. at 680, 1090 S.Ct. at 1398 (Scalia, J., dissenting).

But, we think that the intrusion here is even less than that approved in Von Raab. Here, the test can be taken at the office of the candidate's physician, whereas in Von Raab, the test had to be taken in the company of an (auditory) observer employed by an "independent contractor." Other aspects bearing on the individual's interests are similar to those approved in Von Raab. The district court noted that federally-approved privacy guidelines, such as those at 53 Fed. Reg. 11,979 et seq. (1988), serve as the benchmark for laboratory procedures. The test reveals only the presence or absence of the indicia of the use of

illegal drugs. The results are not made available to law enforcement officers in the event a candidate chooses not to file them (if taken through one's own physician, no state agent need know that the test was administered). And, much like the Customs agents whose privacy expectations are diminished because physical conditioning and ethical behavior are central to job performance, see Von Raab, 489 U.S. at 679, 19 S.Ct. at 1398, candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position.

Because the governmental interests of the state of Georgia outweigh the intrusions on privacy effected by the challenged testing, we hold that O.C.G.A. § 21-2-140, as applied to the appellants, does not violate the Fourth Amendment.

Appellants also contend that by barring from the ballot a class of persons (those who refuse to take drug tests), the Georgia legislature has violated the rights of the candidates to run for office and the people to vote for whom they please. In their briefs and at argument, appellants indicated they would characterize the Fourteenth Amendment as creating a nearly

absolute barrier to excluding a defined group of persons from the ballot. The Supreme Court, however, has rejected that argument, most recently in Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). There, the court recognized Missouri's prerogative to exclude from the ballot most candidates for the state judiciary over a mandatory retirement age of seventy-years. The Court acknowledged that when states bar a class of candidates from the ballot, the Equal Protection Clause provides a check on such state authority,: but cited Article IV, section 4 and the Tenth Amendment for the proposition that our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. This rule is no more than a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." 501 U.S. at 462, 111 S.Ct. at 2402 (citations and internal quotation marks omitted).

Gregory guides us in our disposition of the appellants' equal protection claim. There, the Court held that rational basis scrutiny applies to state electoral qualifications not involving a suspect

classification. 501 U.S. at 470, 111 S.Ct. at 2406. Under rational basis scrutiny, courts "will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979).

Considering the importance of the mental, emotional, and physical health of high public officials, we cannot conclude that the Georgia legislature acted irrationally. Also, the Georgia statute creates less of a barrier than the one upheld in Gregory: whereas Missouri judicial candidates past the mandatory retirement age were permanently barred from the ballot, Georgia candidates are only barred so long as they cannot (or will not) demonstrate that they are drug-free. Thus we hold that O.C.G.A. § 21-2-140 does not improperly infringe on the rights of people to run and of voters to choose the candidate of their choice.

IV

Appellants' First Amendment claim is based on their assertion that the "refusal tamely to submit to the government's drug

testing edict is itself a protected free speech act similar in nature to refusing to salute a flag or the king's hat set upon a post in the village square." We read this argument as an appeal to the rationale of cases like Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974), which invalidated a state statute conditioning ballot access on the filing of an affidavit disavowing the overthrow of state and national governments, and Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), which held that exclusion of a member of the Georgia House of Representatives based on his stated opposition to the Vietnam war violated the First Amendment. We think these cases are distinguishable in that they involve pure speech acts, divorced from unlawful conduct.

In that respect, this case is more like United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the court upheld against a First Amendment challenge the prosecution of a young man who burned his draft card, ostensibly in an effort to persuade others to oppose the Vietnam War. There, the Court states, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376, 88 S.Ct. at 1678. The Court went on, however, to entertain the "assumption that the alleged

communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment." Id. Against this backdrop, the Court held that government regulation of conduct containing "speech and nonspeech" elements is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. at 1679.

Georgia's drug-testing statute passes muster under the framework of O'Brien. First, it is generally within the power of the State of Georgia to prescribe qualifications for its elected officials. See Gregory, 501 U.S. at 463, 111 S.Ct. at 2402.

Second, the statute furthers a substantial governmental interest, as described in the Fourth Amendment analysis above.

Third, the government's purpose is not suppression of free expression. The purpose, as we concluded above, is ensuring that high public officials to whom immense responsibilities are

entrusted possesses the judgment, probity, and alertness required of them. Anyway, it is doubtful whether the statute has even the effect, let alone purpose, of restricting speech rights. We think an audience would much more clearly perceive the intended message of one who burns a draft card than the message of one who declines to take a drug test. See generally Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065. 3069, 82 L.Ed.2d 221 (1984) (noting that First Amendment protection of conduct depends on whether conduct "would reasonably be understood by the viewer to be communicative').

Fourth, the regulation is no more restrictive of expression than is necessary. If Georgia's goal is to preclude the nomination or election of people addicted to drugs then it must require, rather than simply advise, that prospective candidates submit to testing. Appellants have not suggested a less restrictive way for Georgia to accomplish it stated objective of keeping drug users out of office. Therefore, we conclude that whatever impact the Georgia statute has on speech does not violate the First Amendment.

V

No party contends in this appeal that the drug testing in this case is for normal law enforcement. The controversy is about Georgia's rights and the special need Georgia believes it has to take a step to deter illicit drug users from filling important state offices. Especially in the light of federalism and the Tenth Amendment, we are cautions in interfering with the states on matters central to their governance.[5] O.C.G.A. § 21-2-140 does not violate the First, fourth, or Fourteenth Amendment rights of candidates for high office in Georgia; we affirm the judgment of the district court.[6]

---

[1]O.C.G.A. § 21-2-140 provides:

At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate . . . stating that such candidate has been tested for illegal drugs . . . and that the results of such test are negative. . . . No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate . . . .

---

[2]Appellants' brief refers to almost every right enumerated in the Constitution. Many of these textual provisions are touched on only in passing, with no citations of authority. The district court focused exclusively on appellants' Fourth Amendment claim, and Appellants asserted at argument here that they chiefly advanced their First and Fourteenth Amendment claims. We regard all federal constitutional arguments except these (First, Fourth, and Fourteenth Amendments) as either abandoned or without merit.

---

[3]The Von Raab situation might be distinguished on the basis that Congress can define the Customs Department's mission and demand sympathy to that mission as a condition of employment, whereas the executive officers here are members of a branch coequal to the Georgia legislature. We regard this distinction as involving a pure question of state law.

Appellants asserted in their complaint that the testing violates the Georgia Constitution, but the district court decided no issues of state law. 28 U.S.C. § 1367 provides that the district courts "may decline to exercise supplemental jurisdiction over a claim which they otherwise have power to hear if "the claim raises a

novel or complex issue of state law . . . ." Id. The decision jot to exercise supplemental jurisdiction is reviewed for abuse of discretion. Faucher v. Rodziewicz, 891 F.2d 864, 872 (11th Cir. 1990). In view of the complex state constitutional issues presented here and the interests of comity in this sensitive area of federal-state relations, we cannot conclude the district court abused its discretion. See, e.g., Grant v. Seminole County, Fla., 817 F.2d 731, 732, (11th Cir. 1987) finding no abuse of discretion where district court failed to explain dismissal of discretion where district court failed to explain dismissal of state claim, because "[e]xercising pendent jurisdiction over the claim would have required the district court to decide a novel question of state law . . ."). We also decline to decide the issues of state law raised by appellants.

---

[4]Appellants contend that because the test is administered after substantial notice, drug users may simply discontinue their indulgence for a brief period before testing and, thus, defeat the purpose of the test. They say the testing is just ineffective. But, in balancing the Fourth Amendment interests, there is no requirement that a search be the single most effective one a

legislature could design. Also, as the Supreme Court noted in Von Raab, "addicts may be unable to abstain for even a limited period of time, or may be unaware of the 'face-away effect' of certain drugs." 489 U.S. at 676, 109 S.Ct. at 1396 (citations omitted). Persons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office. The testing is not so ineffective as to be unreasonable or irrational in itself.

---

[5]By the way, Georgia publishes almost no official legislative history. And, we do not accept an academic law journal's summary of a post-enactment telephone interview (not conducted under oath) with a single legislator (even one of the sponsors of a bill) as competent legislative history. See, e.g., Blanchette v. Connecticut General Ins. corps., 419 U.S. 102, 132, 95 S.Ct. 335. 353. 42 L.Ed.2d 320 (1974) (rejecting use of "subsequent legislative history" because "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent . . . . Such statements represent only the

personal view of these legislators."). Nor do we--on the basis of such "history"--accept that Georgia's drug testing law is merely or chiefly symbolic, although that which is symbolic may still have great significance. In their brief, plaintiff-appellants cited to no such law review summaries; and we think they--given the lack of true legislative history available--were right not to do so.

---

[6]We are aware that qualifying to run for the pertinent public offices is only a few months away. We also recognize that plaintiff-appellants will likely seek review of our decision. For that reason, we have tried to be expeditious in announcing the decision. Because speed seems important, we have perhaps not said all that we could--especially about history; but we think we have said enough to indicate our general point of view.

BARKETT, Circuit Judge, dissenting:

As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment unless it is required by 'special governmental needs beyond the normal need for law enforcement," and those needs outweigh the candidates' privacy

interests. National Treasury Employees v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91 (1989) (citing Skinner v. Railway labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1401, 1413-14 (1989)). I dissent because I do not believe that the suspicionless search in these circumstances serves any special governmental need beyond the normal need for law enforcement, and, if it did, I believe that the candidates' privacy interests outweigh the governmental interests when the factors of Von Raab are properly considered.

Before balancing the candidates' privacy expectations against the government's interests in conducting suspicionless drug-screening, the court must first ascertain whether this case presents a special governmental need beyond the normal need for law enforcement.[1] In simpler terms, before the court can balance the competing interests in this case, it must first ask what is so impractical about requiring a warrant or individualized suspicion in the circumstances presented here. It is in this threshold inquiry that I believe the majority first errs.

The majority frames its analysis in terms of whether "unlawful drug use is . . . fundamentally incompatible with high state

office." Certainly, the answer to that question is patently obvious, but the question assumes unlawful drug use.[2] This case is not about the incompatibility of drug use and elected office, but rather about whether Fourth Amendment protections can be constitutionally suspended when there is no individualized suspicion, when there is no immediate or direct threat to public safety, when those being searched are not directly involved in the frontlines of drug interdiction, when there is no institutional setting involved such as a prison or public school requiring swift and informal discipline, and when there are no dire consequences as a result of waiting to obtain a warrant if a candidate, or anyone else for that matter, is suspected of violating the law. The first question for the court is not whether the state's interest is great enough and its chosen method effective enough to outweigh the privacy interests involved. Rather, it is whether, under Von Raab, the circumstances in this case give rise to a special governmental need beyond the ordinary needs of law enforcement in the first place. I think not, and the majority's analysis does not support its conclusion to the contrary.[3]

Essentially, the majority's justification for suspending the requirements of the Fourth Amendment is the state's interest in

officeholders who are "drug free," "honest[ ], clear-sighted[ ], and clear-thinking," as well as "appreciative of the perils of drug use" and "[] sympathetic to drug interdiction efforts." Putting aside First Amendment concerns as to whether these subjective traits, as desirable as they may be, can be legislated as valid qualifications for public office, this standard not only fails to address why ordinary law enforcement methods are insufficient to protect these interests, but it makes suspicionless searches the rule and obtaining a warrant almost always irrelevant.[4] Moreover, this rationale seriously erodes the Fourth Amendment's protections for many people beyond the parties involved here.

The Supreme Court has rejected such an overbroad standard in assessing the reasonableness of various governmental drug-testing schemes. In Skinner and Von Raab, the Court suspended Fourth Amendment protections only when the risks of drug impairment affected those directly on the frontline of drug interdiction efforts, or those who, if under the influence of drugs, could pose an imminent physical treat to the public. The Court found a nexus between the risks of drug use and imminent hazards to public safety, for example, where government employees "discharge duties fraught with such risks of injury to

others that even a monetary lapse of attention can have disastrous consequences." Skinner, 489 U.S. at 628, 109 S.Ct. at 1419. The Court held that railway safety is a special governmental need beyond the normal need for law enforcement and justifies the suspicionless urine testing of those employees whose drug and alcohol abuse can "cause great human loss," but noted that the regulations "narrowly and specifically" limited testing to the aftermath of a serious accident when individualized suspicion is "most impracticable," or when employees are otherwise directly involved in safety-rules violations. Id. at 622, 631, 109 S.Ct. at 1416, 1420-21. Moreover, the Court upheld drug testing only after a showing of past history linking drug and alcohol abuse with serious train accidents. Id. at 606-08, 109 S.Ct. at 1407-08.

In Von Raab, the Court likewise required such a nexus in upholding suspicionless urine testing of Customs employees who are involved directly in enforcing drug laws, or are required to carry firearms. Von Raab, 489 U.S. at 670-71, 109 S.Ct. at 1393. While the Court found compelling the Customs Service's interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgement," it also specifically explained how that compelling interest would

be undermined by unlawful drug use among such front-line personnel: "A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals." Von Raab, 489 U.S. at 670, 109 S.Ct. at 1393. The Court recognized that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." Id. at 671, 109 S.Ct. at 1393 (emphasis added).

The narrow focus of these exceptions was reaffirmed in Vernonia School District 47J v. Acton, ___U.S.___, 115 S.Ct. 2386 (1995). The Court held that special governmental needs justify randomly testing the urine of schoolchildren, who hold a diminished expectation of privacy in the public school custodial setting, but noted that "it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Acton, 115 S.Ct. at 2395 (emphasis added). Thus, it appears that even (unathletic) schoolchildren enjoy greater

Fourth Amendment protections than the majority accords the candidates in this case.

There is nothing so special or immediate about the generalized governmental interests involved here as to warrant suspension of the Fourth Amendment's requirement of individualized suspicion for searches and seizures. There are no exigent circumstances. There is no imminent threat of grave physical harm. The prospective candidates are not on the frontlines of drug interdiction. And, we cannot ignore that candidates are subjected to the ultimate screening program--the voice of the electorate. Thus, I believe the majority errs in concluding that a special governmental need beyond the normal need of law enforcement is present in this case.

In addition to being troubled by the majority's assumption that a special governmental need beyond the normal need for law enforcement exists which makes obtaining a warrant impractical in this case, I am troubled by the majority's assessment and balancing of the competing interests involved. This case presents a more serious constitutional question than that in Von Raab and Skinner. In balancing the privacy interests of the employees in Von Raab, the Court recognized that Customs officers already

agree to undergo intrusive screening as a condition of employment: "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." Von Raab, 489 U.S. at 672,109 S.Ct. at 1304 (emphasis added). The Court likened the necessity in those circumstances to the "extraordinary assurances of trustworthiness and probity" and "intrusive inquiries into . . . physical fitness" required of those who undertake "special positions" such as in our military or intelligence services. Id. at 671, 109 S.Ct. at 1394. In Skinner, the Court likewise recognized that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." Skinner, 489 U.S. at 627, 109 S.Ct. at 1418.

I recognize that employment choices may indeed diminish expectations of privacy. An individual need not choose to become a drug interdiction agent, military intelligence officer, or railway engineer, thereby avoiding the intensive training and intrusive screening required by that particular job. But, an

individual does not have a constitutional right to a specific kind of employment. The Constitution, however, protects participation in government. While candidates relinquish to the people a great deal of their privacy in choosing to run for public office, the price should not include sacrificing one's Fourth Amendment right to be free from unreasonable searches and seizures.

In conducting the Von Raab balancing test, the majority fails to adequately consider the totality of the government's "interference with individual liberty." Von Raab, 489 U.S. at 671, 109 S.Ct. at 1393. Not only is the privacy surrounding an individual's bodily functions at stake, but all of the rights associated with participating in a democracy--rights of association, freedom of speech, ballot access, and the right to cast a effective ballot. We are not dealing merely with the denial of a job opportunity, but with the denial of opportunity to participate in our democratic form of government. In light of the interference with these liberty interests, given the governmental interests here the greater weight seems especially unreasonable.

Finally, I am concerned about the majority's conclusion that the government's actions in this case do not violate the First

Amendment. The majority maintains that the government's purpose is not suppression of free expression. Yet, it supports its holding by citing the importance of ensuring that elected officials are "persons appreciative of the perils of drug use" and "[]sympathetic to drug interdiction efforts." Establishing a certain ideology as a "qualification" for holding public office appears to be a content-based restriction on free expression.[5] Drug policy is a politically charged issue confronting many government officials who have disparate points of view regarding the "Drug War" and the efficacy of the means employed in fighting it. It is the function of public office holders to write, enforce, and interpret the laws, including drug laws. By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry. This statute is neither neutral nor procedural, but, in the majority's own characterization, attempts to ensure that only candidates with a certain point of view qualify for public office.

It is beyond peradventure that a bodily search is significantly intrusive. It is almost equally obvious that the means utilized here

would not accomplish the goals purportedly justifying the search.[6] Thus, this search is more a symbolic gesture than an effective tool to ferret out drug-users or assure exemplary public officials.[7] Surely, symbolic gestures are not enough to trump the constitutional imperatives of the Fourth Amendment or the right to participate in government.

---

[1] Whether "[s]pecial needs are involved" in this case is determined not by how urine test results will be used against any particular candidate, but by whether the "need" for such testing is already served by ordinary law enforcement, and is of such a "special" nature as to render the Fourth Amendment's warrant requirement impracticable.

---

[2] O.C.G.A. § 21-2-140 bars from public office either candidates who refuse to take the best because they are ideologically opposed to the government's intrusion upon their privacy, or candidates who fail the test and are thereby only suspected of having committed a crime.

---

[3] The majority's reference to the Tenth Amendment interest in setting qualifications for public office misses the point. Georgia's power under the Tenth Amendment to regulate its electoral process is not absolute. As the majority notes, the state's power to do so is subject to federal constitutional limitations, the extent of which are at issue here.

---

[4] Under this standard, what Fourth Amendment protections would candidates retain to prevent suspicionless testing to research for a physical or mental impairment, AIDS, alcohol or prescription drug abuse, screening DNA for genetic information, or to prevent warrantless invasions of homes to search for drugs, pornography, or other contraband?

---

[5] The Supreme Court struck down a previous attempt by the Georgia legislature to disqualify a citizen from public office on the basis of his ideology, noting that: "Madison and Hamilton

themselves should be treated similarly."

Edith M. Shine, Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992) (citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10, 1993) (footnotes omitted).

Representative Holmes stated that the legislation was proposed in response to similar legislation that required school teachers to undergo urine testing because it was unfair to subject teachers to urine tests unless the politicians enacting such a law also were tested. Id. at 218 n.61. Nonetheless, the law did not apply to politicians who are already in office, but only to prospective candidates for those offices. In any event, the Applicant Drug Screening Act, which precipitated the mandate for suspicionless testing of political candidates, was struck down later as an unconstitutional infringement of employment applicants' Fourth and Fourteenth Amendment rights. Georgia Ass'n of Educators v. Harris, 749 F.Supp. 1110, 114 (N.D. Ga. 1990) (holding generalized governmental interest in maintaining drug-free workplace not sufficiently compelling so as to outweigh applicants' Fourth Amendment rights).

On a final note, Representative Holmes' comments are incapable of "chang[ing] the legislative intent . . . expressed before the Act's passage," as in Blanchette v. Connecticut General Insurance Corps., 419 U.S. 130, 132, 95 S.Ct. 335, 353 (1974) because, as the majority notes, no "official" history of legislative intent exists. Rather, this case is closer to Galvan v. Press, 347 U.S. 522, 526-27, 74 S.Ct. 737, 740 (1954) (relying on 1951 memorandum by Senator McCarran in interpreting ambiguous legislative intent of 1950 statute he sponsored). We are left, therefore, with the wisdom of Mr. Chief Justice John Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 2 Cranch 359, 386, 2 L.Ed. 304 (1805) (quoted in Consumer Product Safety Commission v. GTE Sylvania.

themselves should be treated similarly."

Edith M. Shine, Legislative Review, 9 Ga. St. U. L. Rev. 212, 218 (1992) (citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10, 1993) (footnotes omitted).

Representative Holmes stated that the legislation was proposed in response to similar legislation that required school teachers to undergo urine testing because it was unfair to subject teachers to urine tests unless the politicians enacting such a law also were tested. Id. at 218 n.61. Nonetheless, the law did not apply to politicians who are already in office, but only to prospective candidates for those offices. In any event, the Applicant Drug Screening Act, which precipitated the mandate for suspicionless testing of political candidates, was struck down later as an unconstitutional infringement of employment applicants' Fourth and Fourteenth Amendment rights. Georgia Ass'n of Educators v. Harris, 749 F.Supp. 1110, 114 (N.D. Ga. 1990) (holding generalized governmental interest in maintaining drug-free workplace not sufficiently compelling so as to outweigh applicants' Fourth Amendment rights).

On a final note, Representative Holmes' comments are incapable of "chang[ing] the legislative intent . . . expressed before the Act's passage," as in Blanchette v. Connecticut General Insurance Corps., 419 U.S. 130, 132, 95 S.Ct. 335, 353 (1974) because, as the majority notes, no "official" history of legislative intent exists. Rather, this case is closer to Galvan v. Press, 347 U.S. 522, 526-27, 74 S.Ct. 737, 740 (1954) (relying on 1951 memorandum by Senator McCarran in interpreting ambiguous legislative intent of 1950 statute he sponsored). We are left, therefore, with the wisdom of Mr. Chief Justice John Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 2 Cranch 359, 386, 2 L.Ed. 304 (1805) (quoted in Consumer Product Safety Commission v. GTE Sylvania.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER;

versus Civil Action No. 1:94-CV-1298-ODE

ZELL D. MILLER, Governor; MAX CLELAND,

Secretary of State; JAMES G. LEDBETTER,

Commissioner Department of Human

Resources State of Georgia,

ORDER

This civil action is before the court on Plaintiffs' motion for a preliminary injunction. Both sides filed briefs in support of their

positions pursuant to the court's order of May 24, 1994. The court heard from both sides at a hearing in open court on June 17, 1994.

Plaintiffs, members of the Libertarian Party, are candidates for state office in Georgia. plaintiff Walker L. Chandler seeks the office of Lieutenant Governor. Plaintiff Sharon T. Harris seeks the office of Commissioner of Agriculture. Plaintiff James D. Walker seeks the office of Representative, 85th House District, General Assembly of Georgia.

Plaintiffs seek a declaration that O.C.G.A. §21-2-140 is unconstitutional, coupled with an injunction forbidding Defendants from enforcing §21-2-140. In brief, the challenged statute requires candidates for state office "to certify that such candidate has tested negative for illegal drugs." §21-2-140(b). Plaintiffs allege that §21-2-140 conflicts with several provisions of both the federal and Georgia constitutions. However, both sides have focused their arguments on Plaintiffs' claim that §21-2-140 violates their rights under the Fourth Amendment to the federal constitution.

A preliminary injunction is an extraordinary remedy which should only be granted if the moving party clearly establishes: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Cunningham v. Adams, 808 F.2d 815, 819 (11th Cir. 1987). The Court first addresses whether Plaintiffs have shown that they have a substantial likelihood of prevailing on the merits of their Fourth Amendment claim.

The Fourth Amendment prohibits unreasonable searches and seizures. The issue before the court is whether it is unreasonable for Georgia to require candidates for state office to provide the certification at issue despite the absence of "a warrant, . . . probable cause, . . . [or] any measure of individualized suspicion." See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).[1] The standard that governs the court's analysis follows:

> [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to

> require a warrant or some level of individualized suspicion in the particular context.

Von Raab, 489 U.S. at 665-66 (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619-20 (1989)). Georgia's interest in the operation of each elective office at issue here gives rise to the "special governmental needs" that trigger the Von Raab balancing test. See Willner v. Thornburgh, 928 F.2d 1185, 1188 (D.C. Cir.) ("Railway Labor Executives, 109 S. Ct. at 1414, on which Von Raab relied in formulating the [balancing test], stated that the government's interest in the 'operation of a government office' -- here the Department of Justice -- presents such 'special needs.' 109 S. Ct. at 1390."), cert. denied, __ U. S. __, 116 L. Ed. 2d 760 (1991). For the reasons that follow, the court is persuaded that the importance of the offices sought, as well as the relative unintrusiveness of the testing procedure at issue, make it unlikely that Plaintiffs will prevail on their claim that §21-2-140 violates the Fourth Amendment.

In Von Raab, the Supreme Court noted that the use of illicit drugs is "one of the greatest problems affecting the health

and welfare of our population." Id., 489 U.S. at 668. The Supreme Court thus sanctioned the suspicionless testing of Treasury Department employees who sought 'promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm." Id. at 679. The Supreme Court reasoned that

> [t]he Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.

Id.

The offices at issue in this case do not require the

occupants to use a firearm; nor are the offices frontline positions in the effort to interdict the drug trade. Nevertheless, the offices are held by persons who are the elected representatives of the people of the State of Georgia. From this fact, the court does not believe it can be disputed that the offices are more than ordinary government jobs; i.e., the offices are "special." More- over, all of the offices place ethical demands on the incumbents that do not attend regular government jobs.[2] Given these facts, Georgia is justifiably concerned that those who seek elective office not be drug abusers, both because of the power many elected officials have to influence the effort to interdict the drug trade (through, for example, the legislative process), and because of the negative societal effects (such as cynicism and despair) which would flow from the revelation that an elected official is a drug abuser.

The foregoing analysis shows that valid, compelling concerns motivated Georgia to impose §21-2-140's certification requirement. The court balances the intrusiveness of the certification requirement against these valid, compelling concerns. In their brief, Defendants point out that

> the specimen is produced by the candidate

under circumstances which are largely under the candidate's control. The candidate can control the date and time the specimen is produced, and can and does control the location where the specimen is produced, to include any number of medical testing laboratories across Georgia, as well as the offices of the candidate's personal physician. There certainly is no threat, coercion or force involved, the only motivation for the testing, as far as the candidate is concerned, being the desire to qualify and run for state office.

(State Defendants' Brief in Response to Plaintiffs' Assertions at 3-4)[3] Once the candidate produces a specimen, the only governmental intrusion is a chain-of-custody requirement. After the test is performed, the candidate receives his certificate, presumably through the mail. Since the Candidate controls whether or not the certificate is filed, there is no compulsory

dissemination of the information contained in the certificate. Thus, if the urinalysis reveals a positive result for drugs, the candidate will not be able to qualify, but no one need know that the reason for the lack of qualification is the positive drug result. Given these facts, the court finds that the steps necessary for Plaintiffs to comply with the certification requirement would consist at most of a de minimis intrusion on Plaintiffs' privacy.

Based on the foregoing analysis, the court finds that Defendants likely would prevail on the Von Raab balancing test. The Court now turns to Plaintiffs' contention that §21-2-140 should be invalidated because it fails to accomplish the goal of preventing drug abusers from seeking and holding public office.

Plaintiffs argue that the enforcement of §21-2-140 should be enjoined because the statute will not achieve its presumed goal of barring drug abusers from public office. Plaintiffs note that since the test date is no secret, a drug abuser can abstain from the use of drugs before the test so as to achieve a negative result. Plaintiffs also note that a one-time test will have no effect on drug abuse that occurs after the test. Finally,

Plaintiffs note that there is the potential for adulteration of urine samples given the latitude accorded candidates in producing the samples at their doctors' offices.

The Court need not address Plaintiffs' arguments, for the Supreme Court's decision in Von Raab persuades the court that those arguments do not justify enjoining enforcement of §21-2-140 as an irrational law. The Supreme Court knew the plan at issue in Von Raab only contemplated a one-time drug test, for it recognized the dissent by a judge on the Court of Appeals panel that "persons already employed in sensitive positions are not subject to this test." Id. at 664.[4] Moreover, the Plaintiffs in Von Raab advanced some of the same arguments as Plaintiffs do here. Id. at 673 ("Petitioners contend that . . . illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens.")[5] Nevertheless, the Supreme Court rejected these arguments and concluded its opinion by holding that :suspcionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable." Id. at 679 (emphasis added). Given this precedent, the court cannot

question the validity of §21-2-140, since the alleged infirmities in it are essentially the same as those that were alleged to exist in the plan at issue in Von Raab.

Accordingly, Plaintiffs' motion for a preliminary injunction is DENIED.

SO ORDERED, this 21st day of June, 1994.

s/ Orinda D. Evans

United States District Judge

---

[1] Defendants do not concede that the urinalysis certification at issue constitutes a search for purposes of the Fourth Amendment. Nevertheless, Defendants analyze the certification as if it did involve a search and contend that there is no constitutional violation.

[2] Cf. Ga. Const. art. I, §II, ¶I ("Public officers are the trustees and servants of the people and are at all times amenable to them.").

[3] At the June 17 hearing, Plaintiffs conceded the accuracy of the foregoing description of the method for collecting a urine specimen.

[4] The majority members of the Court of Appeals panel rebutted the dissent's objection as follows:

> Our brother . . . advances as a basis for his dissent that the test is not sufficiently effective in other ways: employees

currently in sensitive positions are not tested and those transferred to sensitive positions are not again tested. Employees in sensitive positions are, however, subject to supervision that may be more intensive than employees in routine tasks. Moreover, offsetting the lesser effectiveness that is achieved by testing only applicants for sensitive jobs is the fact that these persons have volunteered for the jobs and have, in effect, by not withdrawing after notice, at least acquiesced in the test. The dissent, inconsistently it seems to us, argues that the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.

National Treasury Employees Union v. Von Raab, 816 F.2d 170, 180 (5th Cir. 1987), aff'd in part and vacated in part, 489 U.S. 656 (1989). The Court finds that many of the arguments made above apply in this case, given the scrutiny that the holders of elective office experience.

[5] In fairness, the court notes that the sample collection procedures in Von Raab were considerably more stringent than those that exist here.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WALKER L. CHANDLER; SHARON T. HARRIS;

JAMES D. WALKER;

versus Civil Action No. 1:94-CV-1298-ODE

ZELL D. MILLER, Governor; MAX CLELAND, Secretary of State; JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia,

CONSENT ORDER AND FINAL JUDGMENT

This cause came on to be heard on Joint Motion of the Parties for Entry of Final Judgment. This Court entered an Order on

June 21, 1994 denying Plaintiffs' motion for a Preliminary injunction. In order that Plaintiffs may immediately appeal this Order, the parties have submitted a proposed Consent Order and Final Judgment which this Court adopts and approves in its entirety.

Accordingly, this Court incorporates its findings of law included in its Order of June 21, 1994 and adopts the following statements as its finding of facts. on the basis of these findings of facts and of law and in accordance with the Joint Motion of the Parties for Entry of Final Judgment, this Court enters Final Judgment in favor of Defendants.

This Court makes the following findings of fact:

1. During the 1990 session of the General Assembly of Georgia, O.C.G.A. § 21-2-140 was enacted which requires any person seeking to qualify for nomination or election to a state office to file a certificate stating that the candidate has been tested for illegal drugs within 30 days prior to qualifying and that the results of the test are negative. (Copy of O.C.G.A. § 21-2-140 attached as Exhibit A.)

2. Under O.C.G.A. §21-2-140(a)(4) the state offices to which the testing requirement applies are: the Governor, Lieutenant Governor, Secretary of State, Attorney General State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court and Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

3. The statute requires the collection and testing of the fluid samples administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHs Regulations, 53 Fed. Reg. 11979, et seq.) or professionally valid procedures.

4. Candidates for the offices listed above are informed that the required testing may be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. The procedures included in the above Federal Regulations for collection of the specimen are adhered to at both collection sites, including those intended to guarantee the privacy of the potential candidate.

5. The specimen is sent by the lab or the physician's office to an approved laboratory for testing. All chain of custody procedures are complied with fully. (Id.) A five panel drug screen is performed. The certificate contemplated by the statute does not include a detailed chemical analysis of the candidate's urine, or other bodily fluids, but merely provides that a drug screen has been performed and that the results are negative, except as necessary to explain any positive drug test results.

Accordingly, the Joint Motion of the Parties for Entry of Final Judgment is hereby GRANTED and FINAL JUDGMENT is entered in favor of Defendants.

SO ORDERED, this 31st day of January, 1995.

s/ Orinda D. Evans

United States District Judge

O.C.G.A.

21-2-140. Mandatory drug testing for candidates.

a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed.Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine, opiates, amphetamines;or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commission of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for

nomination or election, each such candidate shall file a certificate with the officer with whom such candidate qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates; provided, however, that upon submission of a valid pauper's affidavit and a valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00. No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with apolitical party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State

at such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 21-2-140, enacted by Ga. L. 1990, p. 2015. § 1; Ga,. L. 1992, p. 1612, §§ 1-3/)

No. 96-126

(2)

Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WALKER L. CHANDLER, SHARON T. HARRIS, and JAMES D. WALKER,

Petitioners,

v.

HONORABLE ZELL D. MILLER, LOUIS MASSEY,[1] and JAMES G. LEDBETTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Please serve:

PATRICIA GUILDAY
Assistant Attorney General
Counsel of Record
for the Respondents

MICHAEL J. BOWERS
Attorney General
of the State of Georgia

MICHAEL E. HOBBS
Deputy Attorney General

DENNIS R. DUNN
Senior Assistant Attorney General

40 Capitol Square SW
Atlanta, Georgia 30334-1300
(404) 656-3370
(404) 651-9148 (fax)

[1] Louis Massey was sworn in as Georgia Secretary of State on January 5, 1996.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Eleventh Circuit's opinion, finding O.C.G.A. § 21-2-140, which requires drug testing of persons seeking to qualify for nomination or election to high state offices, valid under the Fourth Amendment, consistent with this Court's drug testing cases, *Skinner* and *Von Raab*?

2. Does O.C.G.A. § 21-2-140, which requires a potential candidate to pass a drug test but does not restrict in any manner the potential candidate's freedom of expression of ideas, constitute a violation of the First Amendment right to free speech?

TABLE OF CONTENTS

Page

STATEMENT OF FACTS 1

REASONS WHY THE PETITION SHOULD BE DENIED 1

1. The decision below is consistent with this Court's decisions in *Skinner* and *Von Raab* 1

2. O.C.G.A. § 21-2-140 does not violate the First Amendment rights of a potential candidate for state political office 4

3. O.C.G.A. § 21-2-140 is plainly valid under the Thirteen and Fourteenth Amendments 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES CITED

Blanchette v. Connecticut General Ins. Corp., 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) 3

Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) 5

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) 1, 2, 3

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) 1, 2, 3

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) 4, 5

STATUTES

O.C.G.A. § 21-2-140 ..... 1, 3, 4

First Amendment 4, 5

Thirteenth Amendment 5

Fourteenth Amendment 5

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Miller, Massey, and Ledbetter respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 73 F.3d 1543 (1996).

STATEMENT OF FACTS

Respondents accept the Statement of Facts as set forth in Petitioners' Brief with the exception of Petitioners' final sentence as to the purported error in the Eleventh Circuit's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is consistent with this Court's decisions in *Skinner* and *Von Raab*.

The Eleventh Circuit's opinion is entirely consistent with this Court's decisions in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The lower appellate court held, first, that O.C.G.A. § 21-2-140 involves a special need beyond the ordinary needs of law enforcement and, second, that the state's interest in serving such need outweighs the privacy interest of the individual seeking to qualify for public office.

The "special need" identified by the panel which triggered the *Skinner-Von Raab* balancing test was the fundamental incompatibility of holding high public office and the use of illegal drugs. The opinion lists at least two components of this "special need:"

> [T]hose vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.
>
> But drug use poses significant dangers beyond rendering elected officials unsympathetic to drug interdiction efforts. The nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking. . . . Simply put, the state's interest in filling these positions with drug-free people is great.

73 F.3d at 1546 (footnotes omitted).

Surely the state government experiences the same need for a drug free governor, legislator, supreme court judge or public service commissioner as the federal government does in identifying and removing drug users from its force of employees involved in drug interdiction. *See Von Raab*, 489 U.S. at 666, 109 S.Ct. at 1391. Many, if not all, of these state office holders enjoy authority over some aspect of the drug interdiction efforts or over other state employees who are intimately involved in such programs. Because the responsibilities of their office involve or may involve some aspect of the illegal drug industry, whether in law enforcement, transportation,

criminal justice, legislation, or financing, high public officials stand as potential targets of pressure, legal or illegal, from persons and entities bent upon furthering illegal drug trafficking and use in Georgia.

Petitioners base their Petition for Certiorari on their disagreement with the philosophy underlying O.C.G.A. § 21-2-140 rather than on a serious claim that such interest is not a "special need" as identified by this Court in the *Skinner* and *Von Raab* decisions. They apparently do not challenge the Eleventh Circuit's decision on the second part of the *Skinner-Von Raab* test, that is, that the state's interest in drug-free elected officials outweighs the potential candidate's privacy interests. Thus, the question of whether a conflict exists between the Eleventh Circuit's decision in this case and the *Skinner-Von Raab* cases is very limited. The lower appellate court appropriately identified a legitimate special need and its opinion is entirely consistent with the controlling decisions of this Court.

Petitioners refer this Court, in part B of their argument, to an academic law journal's summary of a post-enactment telephone interview with a Georgia legislator, relied upon by Judge Barkett in her dissent. 73 F.3d at 1552-1553 n. 7. As the majority pointed out, this Court has rejected such after-the-fact pronouncements by legislators as competent legislative history. 73 F.3d at 1549 n. 5, citing *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974).

2. O.C.G.A. § 21-2-140 does not violate the First Amendment rights of a potential candidate for state political office.

Contrary to the argument posed in Petitioners' brief, the requirement that an individual undergo a test for illegal drugs in order to be eligible to run for political office does not affect the speech rights of the potential candidate. Instead, as the Eleventh Circuit correctly found, if the statute affects speech rights in any respect, it involves a mixture of speech and conduct. Accordingly, in order for O.C.G.A. § 21-2-140 to be valid under the First Amendment, it must meet the four part test adopted by this Court in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The Eleventh Circuit analyzed the statute under each step of this test and found it to be constitutionally valid. Petitioners apparently do not challenge this analysis but argue, at least implicitly, that *O'Brien* has no application because O.C.G.A. § 21-2-140 constitutes a "pure speech" regulation.

In making this argument, Petitioners characterize the statutory drug test requirement as "establishing a certain ideology as a qualification for holding public office." Petitioners' brief at 16. As is obvious, Petitioners disagree that the state has the right to require such testing. Consequently, they argue, compliance by them with the statute will force them to "abandon their principles," in violation of their First Amendment right to free speech. Petitioners remain free at all times, however, both before and after election, to speak out against the requirement and to push for its repeal. Undergoing the drug test no more compels a potential candidate who disagrees with the

statutory requirement to abandon his principles than does payment of local, state, or federal taxes by a potential candidate for state or federal office who challenges the government's right to tax or its use of taxes once collected.

The Eleventh Circuit correctly rejected Petitioners' implicit contention that the drug testing statute constitutes a "pure speech" regulation. The lower appellate court appropriately analyzed the Georgia statute under the *United States v. O'Brien* test and correctly found the statute to be valid under the First Amendment.

3. O.C.G.A. § 21-2-140 is plainly valid under the Thirteenth and Fourteenth Amendments.

The Eleventh Circuit expressly found Petitioners' argument under the Thirteenth Amendment to be "either abandoned or without merit." 73 F.3d at 1545 n. 2. The argument presented to this Court, that the candidate drug testing statute constitutes a "badge of servitude" is, as the Eleventh Circuit held, without merit and certainly does not justify review by this Court.

Petitioners' argument under the Fourteenth Amendment ignores that the Georgia legislation under attack must be supported only by a rational basis. *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). As the Eleventh Circuit observed, "the importance of the mental, emotional, and physical health of high public officials," is not an irrational basis for requiring potential candidates for such offices to undergo testing for illegal drugs. 73 F.3d at 1548.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General
of the State of Georgia

MICHAEL E. HOBBS
Deputy Attorney General

DENNIS R. DUNN
Senior Assistant Attorney General

PATRICIA GUILDAY
Assistant Attorney General
Counsel of Record for the Respondent

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

PATRICIA GUILDAY
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3370

No. 96-126

Supreme Court, U.S.
FILED
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

WALKER L. CHANDLER
ROBERT E. TURNER
Counsel of Record
120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
(770) 567-3882

Attorneys for Petitioners

MICHAEL J. BOWERS
Attorney General of
the State of Georgia
MICHAEL HOBBS
Deputy Assistant Attorney General
DENNIS R. DUNN
Senior Assistant Attorney General
PATRICIA GUILDAY
Assistant Attorney General
Counsel of Record
132 State Judicial Building
Atlanta, GA 30334
(404) 656-466

Attorneys for Respondents

PETITION FOR WRIT OF CERTIORARI FILED JULY 15, 1996
CERTIORARI GRANTED OCTOBER 1, 1996

10 pp

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, ET AL., APPELLANTS

v.

ZELL D. MILLER, ET AL.,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

	Page
A. Relevant docket entries in the United States District Court for the Northern District of Georgia	1
B. District Court: Joint Motion for entry of Final Judgment with attached Statement of Undisputed Facts	3
C. Relevant docket entries in the United States Court of Appeals for the Eleventh Circuit	6
C. 11th Circuit: Order denying Petition for Rehearing and Suggestion of Rehearing En Banc	8

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 94 CV-1298

WALKER L. CHANDLER, ET AL

v.

ZELL MILLER, ET AL.

A. RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5/17/94	1	Complaint filed
5/24/95	4	Order setting hearing on plaintiffs' claims on 6/17/94 at 3 p.m. by Judge Orinda Evans
6/6/94	5	Answer to complaint filed by defendants
6/17/94	—	Hearing held before Judge Orinda D. Evans
6/21/94	9	Order denying plaintiffs' motion for preliminary injunction
1/18/95	15	Joint motion for entry of final judgement filed

1/31/95	16	Order granting joint motion for entry of final judgemnt and final judgement entered.
2/24/95	17	Notice of Appeal filed

B. JOINT MOTION FOR ENTRY OF FINAL JUDGMENT WITH ATTACHED JOINT STATEMENT OF UNDISPUTED FACTS

JOINT MOTION FOR ENTRY OF FINAL JUDGMENT

COME NOW Plaintiffs and Defendants and, pursuant to Rule 54 (a), Fed. R. Civ. P., jointly move this Court for entry of a Final Judgment. This Court entered an Order on June 21, 1994 denying Plaintiffs' Motion for a Preliminary Injunction. In order that Plaintiffs may immediately appeal this Order, the parties have now agreed, subject to the Court's approval, to entry of Final Judgment which incorporates the entirety of the Court's June 21, 1994 Order and the attached Statement of Undisputed Facts.

Wherefore, the parties jointly request that this Court inquire into their Motion and enter final judgment in Defendant's favor according to the terms and substance agreed to by the parties....

JOINT STATEMENT OF UNDISPUTED FACTS

Plaintiffs and Defendants, by and through their undersigned counsel, agree for purposes of entry of Final Judgment that the facts set forth below are undisputed and constitute the evidence of record for purposes of an appeal taken in this matter.

1. During the 1990 session of the General Assembly of Georgia, O.C.G.A. § 21-2-140 was enacted which requires any person seeking to qualify for nomination or election to a state office to file a certificate stating that the candidate has been tested for illegal drugs within 30 days prior to qualifying and that the results of the test are negative. (copy of O.C.G.A. § 21-2-140 attached as Exhibit A.)

2. Under O.C.G.A. § 21-2-140 (a)(4) the state offices to which the testing requirement applies are: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court and Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

3. The statute requires the collection and testing of the fluid samples administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed. Reg. 11979, et seq.) or professionally valid procedures.

4. Candidates for the offices listed above are informed that the required testing may be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. The procedures included in the

above Federal Regulations for collection of the specimen are adhered to at both collection sites, including those intended to guarantee the privacy of the potential candidate.

5. The specimen is sent by the lab or the physician's office to an approved laboratory for testing. All chain of custody procedures are complied with fully. (Id.) A five panel drug screen is performed. The certificate contemplated by the statute does not include a detailed chemical analysis of the candidate's urine, or other bodily fluids, but merely provides that a drug screen has been performed and that he results are negative, except as necessary to explain any positive drug test results.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 95-8230

WALKER L. CHANDLER, SHARON T. HARRIS
AND JAMES D. WALKER,
Plaintiffs-Appellants,

v.

HONORABLE ZELL D. MILLER, et al.,
Defendants-Appellees

C. RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
3/2/95	Acknowledgement of filing of Notice of Appeal
12/13/95	Oral Argument
1/22/96	Opinion announcing decision of the Court

2/12/96	Motion for Rehearing and suggestion of En Banc rehearing filed
4/18/96	Denial of petition for rehearing entered

D. ORDER DENYING PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC
(Opinion__, 11th Cir. 19__, ___F.2d___).

Before: EDMONDSON, DUBINA and BARKETT, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

(4)

Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

No. 96-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

WALKER L. CHANDLER
ROBERT E. TURNER
Counsel of Record
120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
(770) 567-3882

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ◆ WASHINGTON, D.C. ◆ 1-800-347-8208

42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Georgia O.C.G.A. § 21-2-140, that allows suspicionless searches of candidates for political office, violate the Fourth Amendment under the guidelines set out in *Von Raab* and *Skinner*.

2. Is the establishment of the drug-testing scheme as set forth in O.C.G.A. § 21-2-140 a restriction on free expression as well an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment of the United States Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS

All Parties are named in the caption.

There is no parent or subsidiary company to be listed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES . . . . . iv-v

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

U.S. CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. FACTUAL BACKGROUND 3-4

B. BASIS OF JURISDICTION IN FIRST INSTANCE 4

SUMMARY OF ARGUMENT 4-5

ARGUMENT 6

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES CITED:

Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1967) . . . . . iv, 28, 29, 31

Chandler, et al v. Miller, 73 F.3d 1543 (11th Cir. 1995) . . . . . iv, 3, 23, 30

Communist Party of Indiana v. Whitcomb. 94 S Ct.656, 414 U.S. 441 (1973) . . . . . iv, 24, 34, 35

Georgia Association of Educators v. Harris, 749 F. Supp. 1110 (1990) . . . . . iv, 21

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 689 (1989) . . . iv, 3, 4, 6. 10, 11, 12, 13, 14, 19, 20, 21, 22

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct 1402 (1989) . . . . iv, 3-4, 6, 7, 8, 9, 10, 18, 21

Texas v. Johnson, 49 U.S. 397, 109 S.Ct. 2533 (1989) . . . . . iv, 24, 25, 26, 27, 31

United States v. O'Brien, 88 S.Ct. 1673, 391 U.S. 367 (1968) . . . . . iv, 24, 29, 30, 31

Table of Authoritites continued

Page

Vernonia School District 47J v. Acton, __U.S.____, 115 S. Ct. 2386 (1995) . . . . . v, 4, 15, 16, 17, 18

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927) . . . . . v, 28

STATUTES:

O.C.G.A. § 21-2-140 . . . . . v, 5, 6, 8, 19, 23, 24, 33, 36

LAW REVIEW ARTICLE :

Edith M. Shine, *Legislative Review*, 9 Ga. St. U.L.Rev. 212, 218 (1992) . . . . . v, 8, 20, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-126

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 73 F.3d 1543.

The decision of the United States District Court in the Northern District of Georgia is an unreported decision.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1996, The Court of Appeals denied petition for rehearing on April 26, 1996. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. 1254(1) because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the Eleventh Circuit.

U.S. CONSTITUTIONAL PROVISIONS

U.S. Constitution:

First Amendment - Religious and political freedom.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment - Unreasonable searches and seizures.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 21-2-140

STATEMENT OF CASE

A. Factual Background

Plaintiffs-Appellants Walker Chandler, Sharon Harris, and James D. Walker respectfully petitioned for rehearing, and suggested rehearing *en banc*, of the panel decision in *Chandler, et al v. Miller*, 73 F.3d 1543 (11th Cir. 1995) which was denied on April 18, 1996.

In May of 1994, and prior to filing their notices of candidacy for statewide political office and their "drug-free" certificates and paying their qualifying fees, plaintiffs filed this action in the district court. Therein they challenged the constitutionality of the O.C.G.A. § 21-2-140 requirement that they submit certificates showing that they had submitted to urine testing and that such testing had proved negative for the presence of illegal drugs.

After hearing oral argument, the district court issued an order (June 21, 1994) denying Plaintiff's motion for a preliminary injunction. On January 31, 1995, the district court entered a consent order and final judgment incorporating its findings of law which it included in its order of June 21. Plaintiffs-Appellants appealed.

The three-judge panel of the Eleventh Circuit Court of Appeals, in a 2-1 decision, affirmed the judgment of the district court. *Id*. The holding that the law requiring the suspicionless drug-testing of candidates does not violate either Fourth or First Amendment guarantees conflicts with the district court's ruling in *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110 (1990), as well as with the logic set forth by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), *Skinner v. Railway Labor*

Executives' Ass'n, 489 U.S. 602 , 109 S.Ct 1402 (1989), and *Vernonia School District 47J v. Acton,* ____U.S.____, 115 S.Ct. 2386 (1995).

B. Basis of Jurisdiction in the Court of First Instance.

28 U.S.C. 1331, 1243, 2201, 2202, and 42 U.S.C. 1983 *et. seq.*

SUMMARY OF ARGUMENT

I. Georgia Statute § 21-2-140 violates of the Petitioner's Fourth Amendment right to be free from unreasonable Search.

A. The Georgia law O.C.G.A. § 21-2-140 violates the Petitioner's Fourth Amendment right under the analysis of the Court set out in *Von Raab* and *Skinner*, which requires there be a compelling governmental interest that are supported by facts and not mere speculation. No compelling interest supported by facts exit in the in the present case.

B. The candidates Fourth Amendment right to be free from unreasonable search is not diminished where no history of problems exist with drugs being used by candidates for political office. Nor do the candidates have a diminished expectation of privacy where there exist no scheme of pervasive monitoring and regulation of those candidates. The candidates are unlike the individuals in *Skinner* and *Von Raab*, whereby the historical evidence of the problem and the pervasive regulation and monitoring of the employees allowed for warrantless and, in some circumstances, suspicionless searches. In the present case, a balancing of the individual's Fourth Amendment right against the government's interest must be done to determine whether the Fourth Amendment would prohibit the search. The government's interest in conducting the suspicionless searches of candidates has little weight, in the fact that the

government's only discernible interest is symbolic and the drug test is easily avoided. However, the Petitioner's interest in being free from an unreasonable search in an area traditionally shielded by great privacy has great weight.

C. The logic of allowing suspicionless searches based on an unreasonable fear that is not supported by any facts, opens the door for an effective judicial repeal of the Fourth Amendment.

II. Georgia Statute § 21-2-140 is a violation of the Petitioner's First Amendment right of free speech.

A. The candidate's refusal to take a drug test is an action that is a deliberate statement made by the libertarian candidate, recognized as speech under the First Amendment, analogous to the symbolic action taken in *Texas v. Johnson*. The prohibition of the candidate's right to refuse taking the drug test, refusal resulting in the disqualification of his or her eligibility to be a candidate for state office, is a prohibition of free speech. The prohibition of free speech is a violation of the candidate's First Amendment right.

B. When the right of free speech is abridged by the government, a significant and compelling interest by the government is required to overcome the weight of the Petitioner's First Amendment right and the Fourth Amendment rights. No evidence exist that there is a problem with candidates or those using drugs or any other resulting problem; and the only logical reason for the State to require the testing is to compel the candidates to make a symbolic statement of support for the drug war. Therefore, the weight of the government's right is insignificant in relation to Petitioner's rights and this restriction on free speech violates the First Amendment.

C. O.C.G.A § 21-2-140 is an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment.

ARGUMENT

I. Georgia Statute § 21-2-140 is a violation of the Petitioner's Fourth Amendment rights.

A. The Georgia law O.C.G.A. § 21-2-140 violates the Petitioner's Fourth Amendment right under the analysis of the Court set out in *Von Raab* and *Skinner*, which requires there be a compelling governmental interest that is supported by facts and not mere speculation.

The Court has ruled that certain warrantless suspicionless searches by the government, normally prohibited by the Fourth Amendment of the U.S. Constitution, will be allowed in situations where there has been historical evidence of a previous problem that produced great damage. Also, the Court has allowed these searches in areas that are pervasively regulated. In the case at bar, there is no historical basis and no evidence of a problem, and political candidates are not within a group that have a history of being pervasively regulated and supervised, which would result in a diminished expectation of privacy.

In the *Skinner v. Railway labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402 (1989), the court noted the long history of alcohol and drug abuse involved in the railroad industry. In addition, the Court noted the millions of dollars of damage and the substantial loss of life resulting from accidents where alcohol or drug use was indicated or determined to be the cause or contributing factor. 489 U.S., at 607, 109 S.Ct., at 1408 (1989). The regulations provided that a breath or urine test, or both, could be required after an accident or certain dangerous incidents. 489 U.S. at 611, 109 S.Ct., 1410. Also, where a

supervisor has reasonable suspicion that an employee is under the influence of alcohol, that supervisor may require a breath test. The regulations in *Skinner* that were held constitutional allowed warrantless searches/drug tests of railroad employees. They were allowed because the pervasive regulation of the industry and the long history of a substance abuse problem. These regulations possessed individualized suspicion requirements and testing upon the occurrence of accidents or potentially dangerous mistakes.

The Court states that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a school, or prison, 'likewise presents *special needs* beyond normal law enforcement that may justify departure form the usual warrant and probable cause requirements' *Griffin v. Wisconsin*, *supra*, 483 U.S. at 873 - 874, 107 S.Ct., at 3168." The Court further states, "[i]t is undisputed that these and other covered employees are engaged in safety sensitive tasks." 489 U.S. at 620, 109 S.Ct., 1415.

Also, the Court, in allowing these suspicionless searches, has recognized "that the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. [Citations omitted]." 489 U.S. at 623, 109 S.Ct. at 1416. In the present case, there are no such problems with obtaining a warrant: a warrant can be obtained through the normal process with no great threat of imminent danger caused by the delay. Also, the candidates can avoid being detected by simply abstaining from the use of drugs for the required period of time it takes to rid the body of drugs, because the candidate will know

well in advance the time he is to be tested.[1] The testing is patently absurd for determining whether a person is a drug user, considering the easy avoidance of the drug detection within the body. The real reason for O.C.G.A. § 21-2-140 is more clearly explained by Georgia Representative Bob Holmes who stated that it was passed for more symbolic reasons.[2] When examining the facts logically, no purpose can be determined for the drug test other than a symbolic purpose.

In *Skinner*, the Court notes that, "[o]ur cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law." 489 U.S., at 624,

---

[1] O.C.G.A. § 21-2-140-c The candidate has to take the test 30 days prior to qualifying for candidacy. The date of qualifying will be known to the candidate, so he simply has to remain drug free for a certain known period before the test.

[2] The majority has delineated the government's purported interest in ensuring that candidates "have what it takes" to hold public office as justification for the suspicionless urine testing of candidates. However, the available subsequent legislative history indicates that in passing O.C.G.A. § 21-2-140, the Georgia General Assembly did not appear to be motivated by concerns that these politicians exercise their "best judgment and skill," but rather by the desire to enact a symbolic measure:

> " One of the sponsor's of the original 1990 legislation ... proposed the legislation out of a sense of fairness rather than any genuine fear that state politicians were not drug free. The sponsor of the 1990 legislation felt that if city council or state politicians require drug testing of state employees, they too should undergo drug testing. Additionally, if in order to appease public concern about the rights of government employees, the politicians themselves should be treated similarly." Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

109 S.Ct., at 1417. In *Skinner, a* breath test is only required upon individualized suspicion, and blood and urine tests are required upon a specific incident in operation of the railroad. *Ibid*.

In the present case there is no real basis given for drug testing candidates, other than a candidate may possibly use drugs. The fact that the drug test are easily avoided minimizes chances of actually detecting drugs in a candidate. There are no facts of a long history of politicians using illegal drugs or problems resulting from drug use by politicians. Again, because there is no historic or current real demonstrative evidence that would indicate problems of drug use among candidates/politicians, and no compelling governmental interest exist for drug testing of candidates, the only conclusion that can be reached under the *Skinner* reasoning is that the drug search/testing does not meet the reasonable search requirement under the Fourth Amendment. The urine testing procedure is no minor intrusion upon a person's Fourth Amendment right and privacy interest.

The Court recognized in *Skinner,* "the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood and breath testing." 489 U.S., at 626, 109 S.Ct., at 1418. Also, the *Skinner* Court finds that, "[m]ore importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S., at 627, 109 S.Ct., at 1418. And the Court points out, "[h]ere, however , the covered employees have long been a principal focus of regulatory concern." 489 U.S., at 628, 109 S.Ct., at 1419. Further, the Court states, " the Government interest in testing without

showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." And the Court compares them to the employees in a nuclear power plant. 489 U.S., at 628, 109 S.Ct., at 1419.

In the present case, the situation is not similar. No pervasive regulation of candidates of this kind has ever existed. The Government's interest in searching an individual without a showing of individualized suspicion must be compelling. 489 U.S., at 628, 109 S.Ct., at 1419. The candidates subject to drug testing do not normally discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, unlike the employees in a nuclear power plant. No history of a similar pervasive regulatory scheme exist for politicians and the compelling needs of health and fitness are not implicated and no evidence of extreme danger is shown.

The required compelling interest of the State is not present, the only basis for the search is an unsubstantiated fear of the use of drugs by those running for office. The candidates are to be the models for what the U.S. Constitution represents: a democratically elected official that is sworn to uphold the United States Constitution. Ironically, in Georgia, the candidate *is* required to breech this very oath by submitting to what she considers an unconstitutional search.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989), reinforces the proposition that the probability of harm must be great where a search is otherwise considered unreasonable under the Fourth Amendment. The *Von Raab* Court provides at length the dangers of illicit drug users in drug-enforcement and the potential great harm they can do to other agents and members of the public. 489 U.S. at 664, 109

S.Ct. at 1390, thus, finding the searches reasonable. 489 U.S. 656, 668-672, 109 S.Ct. 1388-1392. To emphasize the need of the drug testing, the Court finds "[t]he Customs Service is our first line of defense against one the greatest problems affecting the health and welfare of our population." 489 U.S. at 668, 109 S.Ct. at 1392. The Court compares employment with the Customs Service with employment in the U.S. mint and the military, and, thus, finds a compelling need for the drug testing:

> The Customs Service is our nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have averted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." [Citations omitted]. . . . The record in the case confirms that through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. . ..
>
> Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. [Citations omitted].

489 U.S. at 668-669, 109 S.Ct. at 1392-93.

Based upon these facts, the Court holds that the government has a compelling government interest. 489 U.S., at 670, 109 S.Ct., at 1393. However, Justice Scalia, in his dissent, does not find a compelling interest in this particular case because there is no evidence of any problem that exists with drug agents in their use of drugs. Justice Scalia states in his dissent, "[t]he Court agrees that this constitutes a search for purposes of the Fourth Amendment - and I think it is obvious that it is a type of search

particularly destructive of privacy and offensive to personal dignity." 489 U.S., at 680, 681 109 S.Ct., at 1398, 1399. Each time in previous cases, Justice Scalia notes the Court has pointed to the evidence of the severity of the specific problem and the direct relationship between the search and the serious problem. Justice Scalia goes on to point out that the facts in the *Von Raab* case will be "searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees." 489 U.S., at 681, 109 S.Ct., at 1399. Justice Scalia's dissent further provides:

> in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey v. T.L.O.*, 469 U.S. 325, 339, 105 S.Ct. 733, 741...(1985). When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that "the Immigration and Naturalization Service suggests there may as many as 10 or 12 million aliens illegally in the country," and that "[I]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States v Martinez-Fuerte*, 428 U.S. 543, 551-552, 96 S.Ct. 3074,3080. . . (1976). And the substantive analysis of our opinion today in *Skinner* begins, "the problem of alcohol use on American railroads is as old as the industry itself," and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that "23% of operating personnel were 'problem

> drinkers.' *Skinner* 489 U.S., at 606, and 607, n.1, 109 S.Ct., at 1407, and 1407, n. 1.
>
> The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

489 U.S. at 681, 109 S.Ct. at 1399.

The Court has found a compelling governmental interest only where there are facts that support the existence of a problem resulting in the compelling governmental interest so as to allow a search normally prohibited by the Fourth Amendment. The *Von Raab* majority held that the day to day circumstances of having access to vast quantities of drugs and the temptation from the large amounts of money involved, would put individual agents in a great threat of using illegal drugs and compromising the safety of other agents. Also, the Court found drug agents using illegal drugs would be a danger to the public, as well as putting in jeopardy the entire mission of the drug interdiction effort. 489 U.S. at 669, 109 S.Ct. at 1392, 1393. In addition the Court discounted the agent's expectation to privacy. While the Petitioner does not agree with this particular reasoning of the majority, the *Von Raab* majority of the Court, at least, found some sort of facts that would allow testing. Specifically, the present case is distinguishable from the majority holding in *Von Raab*. The Court found that great danger to society exist in the day to day exposure of agents to drugs, large amounts of money, bribery, and the carrying of firearms. Also, the Court found the potential danger of agents using illegal drugs caused to other agents and the general population to be great. All these concerns combined were necessary to find the imminent danger. No facts or concerns are provided in the present case, such as day to day exposure of agents to drugs or regularly carrying of a firearm.

And the candidates do not have a diminished expectation of privacy caused by traditional government regulation.

In *Von Raab*, the Court tailored the drug testing involved to those individuals in positions where they could cause the greatest harm to other agents, the general public and to the fundamental mission of the service.

> In May of 1986, the Commissioner [of customs] announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of the customs agents. [Citation omitted]. The second criteria is that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." [Citation omitted]. The third criterion is a requirement for the incumbent to handle classified material, which the commissioner determined might fall into the hands of smugglers if accessible to employees who by reason of their own illegal drug use, are susceptible to bribery and blackmail.[Citation omitted].

Von Raab, 489 U.S., at 660-661, 109 S.Ct., at 1388 (1989).

B. The candidates Fourth Amendment right to be free from unreasonable search is not diminished where no history of problems exist with drugs being used by candidates for political office. Nor do the candidates have a diminished expectation of privacy where there exist no scheme of pervasive monitoring and regulation of those candidates. The candidates are unlike the individuals in *Skinner* and *Von Raab*, whereby the historical evidence of the problem and the pervasive regulation and monitoring of the employees allowed for warrantless and, in some circumstances, suspicionless searches. In the present case, a balancing of the individual's Fourth Amendment right against the government's interest must be done to determine whether the Fourth Amendment would prohibit the search. The government's interest in conducting the suspicionless searches of candidates has little weight, in the fact that the government's only discernible interest is symbolic and the drug test is easily avoided. However, the Petitioner's interest in being free from an unreasonable search in an area traditionally shielded by great privacy has great weight.

The Court further clarifies its reasoning in allowing unwarranted, suspicionless searches in *Vernonia school District 47 J, v. Acton*, __ U.S. __, 115 S.Ct. 2386 (1995). The Court allows for an otherwise unreasonable search where there exist evidence of drug usage by a particular group of children in public school within the custody of the state. In *Acton*, the Court provided for a balancing test between the government's compelling interest and the student athletes' Fourth Amendment right to be free from unreasonable search by the government. The Court provides:

> As the text of the Fourth Amendment indicates, the ultimate measure of constitutionality of a government search is 'reasonableness.' At least in a case such as this, where there was no clear practice, either approving or disapproving the type search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." *Skinner, supra*, at 613, 109 S.Ct. at 1414 (quoting *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1393, 1396 . . .(1979).

Acton, __ U.S. __, 115 S.Ct. at 2390 (1995).

The *Acton* Court provides that the first factor to be considered in determining whether a search is reasonable under the Fourth Amendment is the nature of the privacy interest upon which the search intrudes:

> The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T.L.O.*, 469 U.S., at 338, 105 S.Ct., at 741. What expectations are legitimate varies, of course, with the context, *id.*, at 337, 105 S.Ct., at 740, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.

Acton, __ U.S. __, 115 S.Ct., at 2391.

The *Acton* Court, in considering the privacy interest, provides that the individual's legal relationship with the state must be taken into account. *Acton*, __ U.S. __, 115 S.Ct., at 2391. The Court notes that although a probationer's home is protected by the Fourth Amendment, the supervisory relationship

between the State and probationer justifies impingement upon the probationer's privacy that would not be constitutional if applied to the public at large. *Ibid*. Primary to the *Acton* Court holding is that children are involved and they are in the custody of the state:

> Central, in our view, to the present case is the fact that the subjects of the policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.
>
> Traditionally at common law, and still today, emancipated minors lack some of the most fundamental; rights of self-determination – including even the right of liberty in its narrow sense, *i.e.*, the rights to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am.Jur.2d § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life to the tutor or schoolmaster of his child, who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which employed." 1W. Blackstone, Commentaries on Laws of England 441 (1769).

__ U.S. __, 115 S.Ct., at 2391.

The *Acton* Court, considering the requirements of an educational environment and that there is a constitutional duty to protect the

children, holds that the searches of the children are reasonable within the Fourth Amendment. __ U.S. __, 115 S.Ct., at 2396. After a finding of a 1) special custodial relationship, 2) a substantial duty to protect the children, 3) the reduced rights of a minor, and 4) evidence of the specific problem of drug use among athletes, resulting in a compelling and immediate need for the searches, the court holds the searches are reasonable. __ U.S. __, 115 S.Ct., at 2394-95. And finally, in the Section VI of the majority opinion the Court states, " the most significant element in the *Acton* case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." __ U.S. __, 115 S.Ct. at 2396. The present case is clearly distinguishable from the *Acton* case. The present case is not dealing with children who are entrusted to the custody of the state that has a duty to care for the children. The candidates' Fourth Amendment right is not lessened in any way because there has been no evidence of a drug problem with political candidates and there is no immediate or compelling need requiring searches. Application of *Acton* would appear to be limited to a situation in which 1) *children* are in the 2) *custody of the State*, thereby reducing the privacy interest of the individual, and 3) a compelling need of the state to conduct searches exist, specifically, the potential for injury with the use of drugs by athletes.

The Court has found in previous cases that the privacy interest involved with urine testing, is one that traditionally involves great issues of privacy. *Skinner, supra,* 489 U.S., at 626, 109 S.Ct., at 1418. The privacy interest of the candidate is legitimate considering the area of privacy, one that traditionally involves great issues of privacy, the relationship of the candidate to the state is not one that deserves or requires constant regulation, there has never been a history of drug problems with candidates/politician, and there is generally no imminent danger

that can be caused by a candidate. Therefore, the suspicionless search of a candidate violates the Fourth Amendment

1. The weight of the government's interest is insubstantial where the drug test is so easily avoided and does not serve any purpose for detecting drugs in the candidates body.

One of the arguments put forth by the Petitioners in *Von Raab, supra*, 489 U.S., at 676, 109 S.Ct., at 1396, to show that the drug testing involved was a violation of the Fourth Amendment was that the testing was not an effective way to test for drugs because drug detection is easily avoided by abstaining from use of the drugs before the test. In the *Von Raab* decision, the Court discounts Petitioner's reasoning because the agents do not have the information of when there will be drug testing and it takes up to (22) days for some people to eliminate a drug from their system. The Court implies that if the drug test is an ineffective method for detecting drug usage, then such a search is a violation of the Fourth Amendment by being an unreasonable search of a person. *Ibid*. In present case, the drug test is performed within 30 days before a known date for qualifying for candidacy.[3] This drug test is easily avoided resulting in it being ineffective and, therefore, the drug test is an unreasonable search that can not be justified by any compelling interest. Because of the noted ineffectiveness of the drug testing procedure, the government's real interest can not in any way be compelling with regard to the detection of drug use by a candidate. The testing may detect drugs in the worst of addicts of the more addictive drugs (e.g. heroin) who can not stop using the drug for even a short time. There is no evidence that such politicians regularly or otherwise inhabit political office. Sufficient police and elective safeguards are in place to prevent

---

[3] O.C.G.A. § 21-2-140-c

such occurrences from happening, except in the case of an extreme anomaly. An anomaly is no real basis for abrogating an individual's Fourth Amendment rights.

In deciding whether a government search violates the Fourth Amendment, the Court must weigh the Fourth Amendment right/privacy interest of the individual against the governmental interest. The individual candidate is not: 1) in any area of work that is traditionally and pervasively regulated similar to the railroad, 2) a probationer, 3) a child, 4) in the custody of the government where the government is responsible for that person's care, 5) a person who has forfeited his rights by any act of wrong doing and, finally, 6) in a position to do immediate great harm even if she is elected. The purported purpose of the testing, to detect drugs in a candidate's blood, is easily defeated by the drug testing time requirements. The only real interest of the government would appear to be simply a symbolic gesture. The weight of the government's interest is insignificant relative to the individual's Fourth Amendment right.

Like Justice Scalia, dissenting in *Von Raab*, one can "not believe for a minute that the driving force behind these drug-testing rules was any feeble justification put forth by counsel" in the present case. 489 U.S. at 685, 109 S.Ct. at 1401. The more likely reason is suggested by Georgia State Representative, Bob Holmes, indicating a desire to enact a symbolic act.[4] By examining the ineffectiveness of the procedure for testing for drugs and the purpose stated by Representative Holmes, the conclusion that the purpose of the drug testing is merely a symbolic act is one that is easily deduced from these facts. While others may articulate the reason differently, there is no

---

[4] Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992)

substantial evidence or logical reasoning that the testing is done for any other purpose than for symbolic purposes.

C. The logic of allowing suspicionless searches which are based on an unreasonable fear that is not supported by any facts, opens the door for an effective judicial repeal of the Fourth Amendment.

Again, the legitimate governmental interest must be a compelling interest. *Skinner*, *supra*, 489 U.S., at 638, 109 S.Ct., at 1419; *Von Raab*, *supra*, 489 U.S., at 670, 109 S.Ct., at 1419. If a search that ordinarily falls within the protection of Fourth Amendment is allowed when there is no evidence of a specific problem or there is a no evidence of high probability of the occurrence of a problem, but only a subjectively perceived great danger by the government, then there is, in part, an abrogation of the Fourth Amendment. A person could be searched simply because the existence of an unreasonable fear that society holds to be true for which there are no supporting facts. The President, U.S. Congressmen, Judicial appointments and many people working for or involved with the government could be searched because of the fear that a person "might" be using drugs, reasoning that it would be important that no one be placed in any governmental position when they "might" be using drugs, as was attempted in *Georgia Ass'n of Educators v. Harris*, 749 F.Supp. 110 (N.D.Ga 1990) (district court held law that all candidates for public employment be drug tested unconstitutional, as it violated Fourth and Fourteenth Amendments of the U.S Constitution.) Where does the searching/testing stop when an unreasonable and unsubstantiated fear is allowed to supersede the United States Constitution?

Again, urine test searches are in an area that traditionally involve great issues of privacy. *Skinner, supra*, 489 U.S., at 626, 109 S.Ct., at 1418. Under the logic allowing the compelled excretory searches in the present case, a search of all candidates'

homes and any other private areas would be allowed just to be sure they are not involved with drugs.

Justice Scalia points out in the *Von Raab* dissent that there are no facts that drug agents were taking drugs or that this testing will solve any real problems. In the present case there is no evidence of illegal drugs taken by political candidates and there are no problems indicated. There are no contacts in the jobs of candidates, generally, with drugs in the nature of contacts involved similar to that of a drug agent's involvement. To allow this search is to nullify part of the Fourth Amendment. There is no evidence of a problem and no justification for searching a political candidate: "In *Skinner, Bell, T.L.O., and Martinez-Fuerte,* we took pains to establish the existence of special need for the search or seizure—a need based not upon the existence of a 'pervasive social problem' combined with speculation as to the effect of that problem in the field at issue, but rather upon well-known or well-demonstrated evils *in that field*, with well-known or well-demonstrated consequences." Justice Scalia's dissent, *Von Raab*, *supra*, 489 U.S. at 684, 109 S.Ct. at 1400.

Essentially, if the case at bar is upheld as constitutional, all the legislative branch has to do to allow a search is to raise a mere concern for a pervasive social problem, combine it with speculation and they thereby have the means to conduct a search that is otherwise protected by the Fourth Amendment with no substantive proof that a problem exit with that particular person. If this type of search in the present case is reasoned not to be a Fourth Amendment violation, it is certainly within the parameters of such reasoning to allow searches of all persons working within the government. For example, all teachers could be searched simply because they deal with children, who are the future of the United States, and there is a possibility the teachers could use drugs and do harm to our children. The Petitioner argues the Fourth Amendment does not allow such searches that

are without suspicion and where there is no evidence of danger, but merely a possibility.

In the present case, nothing supports the suspicion of any drug related activity among candidates. The police authority with there ability to search on probable cause can take care of any problems that arise. The State has never shown any substantial problem that has resulted from drug use by those in political office. So should the Court abrogate the Fourth Amendment right simply based on some fear that has no factual basis of support that some disaster could occur? If O.C.G.A. § 21-2-140 stands, a search can not be denied based on any situation where the majority perceives a great threat based on no real facts. The Fourth Amendment does not allow for searches based on fear and it does not allow suspicionless searches of political candidates. Under the logic of *Chandler*, 73F.3d 1543 (1996), a person could be searched where ever there is a any kind of a fear that a person might be using drugs. The logic of the court below could be applied to substantially repeal the Fourth Amendment.

In the present case, no compelling interest of the government can be found. The political candidates are chosen by the majority of voters of the specific geographical area in which they are located. The government should not have the right to deny someone access to the ballot based simply on the fact there is an unreasonable fear that a candidate could be using drugs when the voting population will choose the candidate. The safeguards built into the elective process and the use of constitutional probable cause searches are sufficient to protect the people from drug users in political office.

II. Is the establishment of drug-testing scheme, as is set forth in O.C.G.A. § 21-2-140, a restriction on free expression as well an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment of the United States Constitution.

The issue of whether 1) the compelled act of drug testing is a forced act of symbolic speech, or whether 2) the disqualification of the candidate for performing the symbolic act of refusing to submit is an unreasonable restriction on free speech, involves several questions. First there is the issue whether there is speech involved by being forced to act or taking the action of refusal. *Texas v. Johnson* 489 U.S. 397, 109 S.Ct. 2533 (1989). Second if there is speech involved, one must determine whether there is a compelling interest that allows the government to restrict the speech involved. *See Communist Party of Indiana v. Whitcomb*, 94 S.Ct.656, 662, 414 U.S. 441 (1974), *United States v. O'Brien*, 88 S.Ct. 1673, 391 U.S. 367 (1968). This interest of the government must be examined in respect to the speech interest involved, considering the relationship of the individual with the state. *Communist Party of Indiana v. Whitcomb*, 94 S Ct. 656, 414 U.S. 441 (1974).

A. The Libertarian candidate's refusal to take a drug test is a symbolic action that is a deliberate statement made by the candidate, recognized as speech under the First Amendment, analogous to the symbolic action taken in *Texas v. Johnson*. The prohibition of the candidate's right to refuse taking the drug test, refusal resulting in the disqualification of his or her eligibility to be a candidate for state office, is a prohibition of free speech. The prohibition of free speech is a violation candidate's First Amendment right.

The First Amendment does not simply protect the spoken or written word. It also incorporates those actions that are, in effect, speech. We are all aware of the cliché that "action speaks loader than words." The Court has recognized certain acts are communicative:

> The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien*, at 376, 88 S.Ct. at 1678, we may have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,' *Spence*, at 409, 94 S.Ct., at 2730.
>
> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message

would be understood by those who viewed it." 418 U.S. at 410-411, 94 S.Ct., at 2730.

Texas v. Johnson, 489 U.S. 397, 404, 109 S.Ct. 2533, 2539 (1989).

The action desired to be taken by the Libertarian candidates is to refuse to submit to the drug tests; however, the candidates are forced to take an action that is completely opposed to their constitutional beliefs and their personal, political Party ideology. They are forced to submit themselves to what they believe to be an unconstitutional search, acting in contradiction of their fundamental beliefs that such a government intrusion is prohibited by the Fourth Amendment. In effect, they are compelled to make a statement[5] through an action that speaks much loader than any spoken or written word. The Libertarian candidates are denied the right to make a political statement, regarding the government's right to make an unreasonable search, by the act of refusing to submit themselves to a symbolic drug test. If a potential candidate refuses to be tested, she will not be allowed to be a candidate for office, forcing them to submit to the test. The conduct of the candidate, refusing to submit to the drug test, possesses sufficient communicative elements to bring the First Amendment into play because "[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be would be understood by those who viewed it. 418 U.S. at 410-411, 94 S.Ct., at 2730." *Johnson, supra,* 418 U.S. at 410-411, 94 S.Ct., at 2730. The act of complying to the test is communicative and the purpose is symbolic, as was recognized by Georgia

---

[5] The compelled symbolic statement being forced upon the candidate is the statement that the candidate accepts the right of the government to make an unconstitutionally intrusive search for the purpose of simply qualifying to be a political candidate.

Representative Bob Holmes as well as one of the sponsor's of the original 1990 act.[6]

The Court has recognized the symbolic nature of an act, i.e., that an act can be equivalent to speech, as with the burning of an American Flag:

> That we have little difficulty identifying an expressive element in conduct relating to flags should not be surprising.
>
> "The flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas."

Texas v. Johnson 49 U.S. 397, 404, 109 S.Ct. 2533, 2539, citing *West Virginia board of Education v. Barnette*, 319 U.S. 624,632 S.Ct. 1178, 1182. Clearly, the act of a Libertarian refusing to submit to the constitutionally infirm search/drug test required by the government, or the act of submitting to a search/drug test conducted by the government is powerful symbolic speech.

---

[6] "One of the sponsor's of the original 1990 legislation ... proposed the legislation out of a sense of fairness rather than any genuine fear that state politicians were not drug free. The sponsor of the 1990 legislation felt that if city council or state politicians require drug testing of state employees, they too should undergo drug testing. Additionally, if in order to appease the public concern about the use of illegal drugs politicians must infringe upon the rights of government employees, the politicians themselves should be treated similarly." Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

B. When the right of free speech is abridged by the government, a significant and compelling interest is required by the government to overcome the weight of the Petitioner's First Amendment right and the Fourth Amendment right. No evidence exist that there is a problem with candidates using drugs or any other resulting problem; and the only logical reason for the State to require the testing is to compel the candidates to make a symbolic statement of support for the drug war. Therefore, the weight of the government's right is insignificant in relation to Petitioner's rights.

The Court, in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927), upheld a California statute that provided that a group that advocated violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reforms, and the gathering of such groups to advocate such policies was illegal. The *Whitney* Court:

> upheld the statute on the ground that, without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the state that the state may outlaw it. Cf. *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S 494, at 507, 71 S.Ct. 857, at 866, 95 L.Ed. 1137 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, at 447, 89 S.Ct. 1827, at 1829 (1967),

In short form, the Court is requiring there to be some imminent danger caused by the particular speech in question for the Government to be able to encroach upon the fundamental right of free speech. The Court further provides that:

> Accordingly, we are here confronted with a statute which, by its on words and as applied, purports to punish mere advocacy and to forbid the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, *supra*, can-not be supported, and that decision is therefore overruled.

Brandenburg, 395 U.S. 444, at 449 89 S.Ct. at 1830-1831.

The reasoning in the *Brandenburg* case, with its overruling of *Whitney*, stands for the proposition that the First Amendment and other fundamental right concerns can not simply be brushed aside in a situation where no real immediate danger is threatened. The Court has held some real danger must exist to allow the Government to limit the Fourth Amendment, as indicated in the Petitioner's argument above. While providing law abiding candidates to the electorate is an important concern, there are substantial other mechanisms that provide the people with assurances as to this concern: police enforcement, media reporting, the politician's relationship with the people in the government and contact with the general public. There is no substantive reason to violate a political candidates' First and Fourth Amendment fundamental rights.

The Respondents and the 11th circuit majority have implicitly argued that *United States v. O'Brien*, 88 S.Ct. 1673, 391 U.S. 367, (1968), provides that no compelling interest is

needed for a state regulation on the basis of the following portion of the *O'Brien* decision:

> To characterize the quality of the governmental interest which must appear, the court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is justified if it is within the constitutional power of the government; if it furthers a substantial Government interest that is unrelated to the suppression of free expression; if the governmental interest is unrelated to the suppression of free speech; and if the incidental restriction on alleged Freedoms are no greater than is essential to the furtherance of that interest.

O'Brien, 88 S.Ct. 1673, 1379, 391 U.S. 367, 376, 377 (1968).

Regardless of the recharacterization of the nature of the interest required by the *O'Brien* Court, the Court did not change the requirement that the government have a substantial, compelling, or paramount interest to encroach on an individual's freedom of speech. The requirement of having a compelling interest is especially true in the situation where the free speech involves political debate.

The majority of the Eleventh Circuit Court of appeals in the present case holds that "Georgia's drug testing statute passes muster under the framework of *O'Brien*." *Chandler*, 73 F3d 1543, 1548 (11th Cir. 1996). The Petitioner respectfully disagrees with this conclusion. First, while it is may be generally within the power of the state to prescribe qualifications for its elected officials, it is not within the power of the state to violate the candidates First or Fourth Amendment right. Second the statute does not further any substantial governmental interest. The

purpose of the statute has been shown to have been enacted for symbolic purposes; and it has been shown in argument that the stated purpose for the testing is to determine whether the candidate is a drug user is easily defeated given the time period for taking the test. Third, the purpose of the government is the suppression of free speech. The candidate is being forced perform to perform an act of communication, an act of speech that is contrary to her position as to the meaning of the constitution, by accepting the requirement that he she urinate into a container so the urine can be tested for drugs. There can be little doubt that the State is trying to force speech on an individual, speech that belongs in a political debate: a Georgia representative has been quoted as saying the statute was enacted for symbolic purposes, an act of communication.[7] The candidate is making a different statement by refusing to do the act. The Libertarian candidate is making the statement that such intrusive searches violate the Fourth Amendment, and that the justification of this search based on the drug war is no real justification. Fourth the statute is more restrictive of expression than is necessary, because there is no evidence of a problem and, therefore, no need for any such test. Because the drug test is 1) easily avoided, 2) it violates the candidates First and Fourth Amendment rights, and 3) it was simply enacted for symbolic purposes, the degree of restriction it places upon the candidates constitutional rights is unjustifiable. See *O'Brien*, *supra*, 88 S.Ct., at 1379, 391 U.S., at 376, 377

The formalistic application of the test used in O'Brien applied by the 11th circuit in this case appears to be out of line with *Brandenburg*, 395 U.S. 444, 89 S.Ct. 1827, *supra*, and *Texas v. Johnson*, *supra*, 49 U.S. 397, 109 S.Ct. 2533. In

---

[7] Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

Johnson, the mere potential that their would be a breech of peace every time a flag was burned was not a sufficient interest to proscribe such symbolic speech:

> To accept Texas' argument that it need only demonstrate 'the potential for breech of the peace', Brief for Petitioner 37, 'and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.'

Texas v. Johnson, 49 U.S. 397, 409, 109 S.Ct. 2533, 2542.

Similar to the reasoning in the *Johnson* case, to accept Georgia's "argument that it need only demonstrate the potential for" a drug impaired politician holding office could inflict damage on the population, and that every candidate possesses that potential, would be to eviscerate the Court's holding in *Brandenburg*. *Ibid*. To eviscerate the holding in *Brandenburg* would mean to allow restrictions on First Amendment Speech simply because there is only an unsubstantiated threat of danger. The potential danger in the present case is not sufficient to allow the abrogation of the First Amendment right of free speech in the present case.

"[T]his Court has held in many contexts that the First and Fourteenth Amendments render invalid statutes regulating advocacy that are not limited to advocacy of action. And as we have so often emphasized, '[p]recision of regulation must be the touch stone in an area so closely touching our most precious freedoms.'" *Communist Party of Indiana v. Whitcomb*. 94 S Ct.656, 661, 414 U.S. 441, 447 (1973) citing *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340 (1927). There is no precision in the Georgia law requiring the candidates to have a blood test. First, it denies the candidates First Amendment right to protest the drug testing by refusing to take the drug test.

Second, it denies a candidates First and Fourth Amendment rights where there is no compelling interest. Because the Georgia legislature can provide no evidence that a drug problem exist with candidates or that it causes any problems for those in the legislature, no sufficient interest exists for the Georgia legislature to encroach on the individual's First and Fourth Amendment rights. There is no precision in a law that requires the sacrifice of fundamental rights because only the generalized fear that candidates may use drugs.

C. O.C.G.A § 21-2-140 is an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment.

While it is true that States may administer the electoral process, this administration is not without limits:

> "To be sure, administration of the electoral process is a matter that the Constitution largely entrust to the States. But in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, at 57, 94 U.S. 303, at 307, 38 L.Ed.2d 260 (footnote omitted). At stake are the appellants' First and Fourteenth amendment rights to associate with others for the advancement of political beliefs and ideas.
>
> "The rights to associate with the political beliefs of one's choice is an integral part of the basic constitutional freedom." *Ibid.*, *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968). At stake as well are the appellants' interest as party members in casting an effective ballot. See *Bullock v.*

Carter, 405 U.S. 134, 142-144, 92 S.Ct. 849, 855-856, 31 L.Ed.2d 92 (1972).

Thus, burdening access of the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the party urges others "to do something now or in the future . . . [but] . . . merely to *believe* in something," *Yates v. United States*, *supra*, 354 U.S. 298, 77 S.Ct. at 1080, is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law. For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ." *Reynolds v. Sims*, 377 U.S. 533 , 562, 84 S.Ct. 1362, 1381, 12 1.Ed.2d 506 (1964). "Other rights, even the most basic are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

Communist Party of Indiana v. Whitcomb, 94 S Ct.656, 662, 414 U.S. 441, 449-450 (1974).

"Thus, burdening access of the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the party" or its candidates uses or promotes the use of illegal drugs but merely to stand up for their Fourth Amendment right to be free from a warrantless, suspicionless and unreasonable search "is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law." For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Ibid*.

The Court declares that, "in exercising their powers of supervision over elections and in setting qualifications for voters,

the States may not infringe upon basic constitutional protections." *Whitcomb*, 94 S Ct.656, 662, 414 U.S. 441, 449-450 (1974).citing *Kusper v. Pontikes*, 414 U.S. 51, at 57, 94 U.S. 303, at 307, 38 L.Ed.2d 260 (footnote omitted). The state of Georgia does not merely infringe upon the Petitioners basic Constitutional rights, but it runs carefree, trampling over these rights.

The Libertarian party is a party of people who believe the drug war is unnecessary and a great waste of resources by the Federal and State government. They, also, believe that the government does not have the constitutional right to make such intrusive searches on the individual where no suspicion of wrongdoing exist. The candidate's refusal is both a statement that they reject the actions taken in the "drug war" and the resulting constitutional violations. To restrict the candidates first Amendment right to make such a political protest where they have broken no law and no compelling interest is served violates the First and Fourth Amendment, and the intent of the U.S. Constitution that the people of this country live in a free society.

In the case at Bar, the libertarian candidates are attempting to make a politically charged statement that they refuse to submit to a constitutionally prohibited government search. But upon refusal of the test, the candidates are then prevented from participating in the electoral contest. The state is forcing the candidate to comply with the drug test by otherwise preventing them from being a candidate. The candidate is prevented from making this powerful statement if he chooses to be a candidate for office.

There is a slight possibility that a candidate "might" use drugs; but their is a great possibly that if a candidate commits an illegal act, the police, the press, the electorate or the people with which the candidate associates will be aware of it. Again, no compelling need of the state exist that requires such searches that

violate the Fourth Amendment or such violations of the First Amendment. Given that we are speaking about a law that interferes with an individual's First and Fourth amendment rights, and rights of election ballot access and association, Georgia does not have a sufficiently compelling interest to counter the weight of the rights of the individual. The State's lack of a compelling interest is even more apparent considering there are no facts to support drug usage by the legislature, and, in addition, there is a lack of any contact with drugs related to the job, unlike the situation for the Drug Agents in *Von Raab*.

CONCLUSION

The Court should hold unconstitutional O.C.G.A. § 21-2-140 reversing the Eleventh Circuit Court of Appeals.

WALKER L. CHANDLER
ROBERT E. TURNER
Counsel of Record
120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
(770) 567-3882

Attorneys for Petitioners

No. 96-43

In The

Supreme Court of the United States

October Term, 1996

WALKER L. CHANDLER, SHARON T. HARRIS, JAMES D. WALKER,

Petitioners,

v.

HONORABLE ZELL D. MILLER, LEWIS MASSEY, JAMES G. LEDBETTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS

Patricia Guilday
Assistant Attorney General
Counsel of Record for Respondents

Michael J. Bowers
Attorney General

Michael E. Hobbs
Deputy Attorney General

Dawn D. Dunn
Senior Assistant Attorney General

Please serve:
Patricia Guilday
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1.

Is Georgia's Candidate Drug Testing Statute a legitimate exercise of state sovereignty under the Tenth Amendment and is its drug testing requirement a reasonable Fourth Amendment search?

2.

Does the Candidate Drug Testing Statute impose any restrictions upon Petitioners' First Amendment rights and, assuming it does, is it a content-neutral speech regulation which imposes only minimal burdens on speech rights and is justified by important state interests?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

A. Procedural History 1

B. O.C.G.A. § 21-2-140 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. GEORGIA'S CANDIDATE DRUG TESTING STATUTE IS A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT AND DOES NOT VIOLATE PETITIONERS' FOURTH AMENDMENT RIGHTS 5

A. Introduction 5

B. Because the Georgia drug testing statute imposes only reasonable, nondiscriminatory restrictions upon Petitioners' fundamental rights, it is valid under the Tenth Amendment and requires Petitioners' Fourth Amendment challenge to be analyzed under a lowered level of scrutiny 6

1. The Tenth Amendment entitles Georgia to determine for itself the qualifications of its elected officials and such qualification requirements are entitled to great deference by this Court 6

2. The Georgia statute imposes only reasonable, nondiscriminatory restrictions of Petitioners' Fourth Amendment rights 8

TABLE OF CONTENTS – Continued

Page

3. The drug testing statute serves important state interests 11

C. The Candidate Drug Testing statute is valid under the Fourth Amendment because its minimal intrusions into the potential candidate's legitimate expectations of privacy are substantially outweighed by important state interests 18

II. THE CANDIDATE DRUG TESTING STATUTE IMPOSES NO RESTRICTIONS UPON PETITIONERS' FIRST AMENDMENT RIGHTS AND, ASSUMING IT DOES, IT IS A CONTENT-NEUTRAL SPEECH REGULATION WHICH IMPOSES ONLY MINIMAL BURDENS ON SPEECH RIGHTS AND IS JUSTIFIED BY IMPORTANT STATE INTERESTS 26

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES CITED

Anderson v. Celebrezze, 460 U.S. 780 (1983) 8

Bond v. Floyd, 385 U.S. 116 (1966) 30, 31

Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892) 7

Bread Political Action Committee v. FEC, 455 U.S. 577 (1982) 17

Buckley v. Valeo, 424 U.S. 1 (1976) 23

Burdick v. Takushi, 504 U.S. 428 (1992) ..... *passim*

Chandler v. Miller, 73 F.3d 1543 (11th Cir. 1996) 14

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 26, 29

Employment Division v. Smith, 494 U.S. 872 (1989) 28

Garrison v. Louisiana, 379 U.S. 64 (1964) 21, 22

Gregory v. Ashcroft, 501 U.S. 452 (1991) ..... *passim*

Igneri v. Moore, 898 F.2d 870 (2nd Cir. 1990) 23

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 7

Malcolm v. Webb, 211 Ga. 449 (1955) 12

McIntyre v. Ohio Elections Comm., 514 U.S. ___, 115 S.Ct. 1511 (1995) 29, 30

Meinhard v. Salmon, 249 N.Y. 458 (1928) 12

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1970) 21, 22

National Treasury Employees Union v. United States Customs Service, 27 F.3d 623 (D.C. Cir. 1994) 23

TABLE OF AUTHORITIES – Continued

Page

New York Times v. Sullivan, 376 U.S. 254 (1964) 21, 22

Nixon v. Administration of General Services, 433 U.S. 425 (1976) 22

Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1970) 21

Pope v. Williams, 193 U.S. 621 (1904) 8

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) ..... *passim*

Sugarman v. Dougall, 413 U.S. 634 (1973) 6

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 6

Taylor v. Beckham, 178 U.S. 548 (1900) 7, 8

Texas v. Johnson, 491 U.S. 397 (1989) 27

Treasury Employees v. Von Raab, 489 U.S. 656 (1989) *passim*

Turner Broadcasting System, Inc. v. FCC, 512 U.S. ___, 114 S.Ct. 2445 (1994) 17, 29, 30, 31

United States v. Barry, 938 F.2d 1327 (D.C. Cir. 1991) 14, 16

United States v. Barry, 961 F.2d 1327 (D.C. Cir. 1992) 15

United States v. O'Brien, 391 U.S. 367 (1968) 18, 27

Vernonia School Dist. v. Acton, 515 U.S. ___, 115 S.Ct. 2386 (1995) ..... *passim*

Werme v. Merrill, 84 F.3d 479 (1st Cir. 1996) 16

Wright v. West, 505 U.S. 277 (1992) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS CITED

U.S. Const., Amend. 1 ..... 4, 8, 26, 27, 28, 29
U.S. Const., Amend. 4 ..... *passim*
U.S. Const., Amend. 10 ..... *passim*
U.S. Const., Amend. 14 ..... 7, 8

STATUTES AND REGULATIONS

Ga. Const., Art. 1, Sec. II, Par. 1 12
O.C.G.A. § 21-2-2(19) 9
O.C.G.A. § 21-2-2(21) 9
O.C.G.A. § 21-2-140 ..... 1, 9, 14, 17, 28, 30
O.C.G.A. § 21-2-140(a)(2) 2
O.C.G.A. § 21-2-140(a)(4) 1, 13
O.C.G.A. § 21-2-140(c) 3
O.C.G.A. § 21-5-30 *et seq.* 23
O.C.G.A. § 21-5-50(c)(1) 23
HHS Regulations, 53 Fed. Reg. 11979 *et seq.* 1, 2

STATEMENT OF THE CASE

A. Procedural History

Respondents (hereinafter "Georgia") accept the "Factual Background" of this case as set forth in Petitioners' brief at 3 with the exception of the final paragraph which constitutes argument concerning the merits of the Eleventh Circuit's opinion.

B. O.C.G.A. § 21-2-140

In 1990, the Georgia General Assembly enacted O.C.G.A. § 21-2-140 which requires candidates for many state public offices to take a urine drug test each time they seek to qualify to run for such office. (Copy of O.C.G.A. § 21-2-140 included in Georgia's Appendix to this Brief at A-1.) The "state offices" to which the drug testing requirement applies are set forth in subsection (a)(4) of the Act and include all elected constitutional officers.

The procedures which must be followed for compliance with the drug testing requirement of O.C.G.A. § 21-2-140 are set forth in the statute or were agreed upon in the Joint Statement of Undisputed Facts. (Joint Statement of Undisputed Facts included in Appendix at A-4.) The statute gives notice to potential candidates that eligibility for candidacy for any of the specified offices is conditioned upon submission of negative drug test results. The collection and testing of the specimen samples are administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed.

Reg. 11979 *et seq.*) or other professionally valid procedures. O.C.G.A. § 21-2-140(a)(2).

The statute allows the required testing to be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. (Joint Statement of Undisputed Facts) A3-5. The individual may provide the specimen in a stall or a partitioned area. 53 Fed. Reg. 11979, Subpart B, § 2.2(f)(7). If an agency-designated collection site is not available, then the collection site person remains in the restroom but outside the stall until the specimen is collected. *Id.* § 2.2(f)(9).

Only approved laboratories are used for analysis of the specimen and all chain of custody procedures are followed. A five panel drug screen is performed and there is no analysis to determine the presence of any other drugs, legal or illegal, or to identify physical or medical conditions such as pregnancy or epilepsy. *Id.* If an individual tests positive because he or she is taking a prescribed medication which is identified by the testing laboratory, the candidate may attach to his test report documentation from his physician that the medication has been prescribed.

The statute provides that the candidate shall submit certification that he or she has been tested for illegal drugs within 30 days prior to qualifying for nomination or election to state office and that the result of such test was negative (or if positive because of prescribed medication, medical documentation must also be submitted).

O.C.G.A. § 21-2-140(c). The laboratory forwards the testing results directly and only to the candidate. The information revealed by a positive result is not made available by the laboratory to any law enforcement agency or any agency responsible for criminal prosecution.

SUMMARY OF ARGUMENT

The Georgia candidate drug testing statute, O.C.G.A. § 21-2-140, was enacted pursuant to the power accorded the States under the Tenth Amendment. (Copy of Tenth Amendment included in Appendix at A-7.) This election qualifications statute is valid under the Tenth and Fourth Amendments because it imposes only reasonable and nondiscriminatory burdens upon Petitioners' right to be free from unreasonable search, there is a special need for such drug testing requirement, and such burdens as may be imposed by the drug testing requirement are substantially outweighed by important interests which justify the state's objective of identifying potential candidates who use illegal drugs. (Copy of Fourth Amendment included in Appendix at A-8.)

These important interests include giving assurance to Georgia voters that the candidates who seek to run for public office will have the integrity, trustworthiness, and judgment necessary to fulfill the significant responsibilities of state public office; avoiding the damage to public trust and confidence in government and damage to governmental operations which would result from an abuse of power by an elected official who has a problem

with illegal drugs; and deterring some individuals who use illegal drugs from entering the political arena.

The Court of Appeals for the Eleventh Circuit properly analyzed Respondent's candidate drug testing statute under the tests set forth in this Court's cases arising under the Tenth Amendment, *Burdick v. Takushi*, 504 U.S. 428 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); and those which have considered the validity of other government-imposed drug testing programs under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School Dist. v. Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995). The majority's decision that the statute is a valid exercise of the power accorded to the States under the Tenth Amendment and that it does not violate Petitioners' rights under the Fourth Amendment should be affirmed.

With respect to Petitioners' argument under the First Amendment, the candidate drug testing statute does not in any way affect the free speech rights of potential candidates. (Copy of First Amendment included in Appendix at A-9.) Assuming any such impact, the statute is a content-neutral regulation and is justified by important state interests. The statute is therefore valid under the First Amendment and this Court should affirm the decision of the Eleventh Circuit on this issue.

ARGUMENT

I. GEORGIA'S CANDIDATE DRUG TESTING STATUTE IS A LEGITIMATE EXERCISE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT AND ITS DRUG TESTING REQUIREMENT IS A REASONABLE FOURTH AMENDMENT SEARCH.

A. Introduction

Georgia's drug testing statute is a valid exercise of the Georgia General Assembly's power under the Tenth Amendment to determine the qualifications of candidates to state elected offices. Under the Tenth Amendment, an election statute is constitutional if the level of restriction imposed upon fundamental rights is outweighed by the state's asserted justifications for the statute. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Further, the level of inquiry used in the analysis of the constitutionality of an election statute is lower than the level of scrutiny used by this Court in cases attacking the constitutionality of other types of statutes because of the deference given to the states under the Tenth Amendment to regulate their own elections. *Id.* This analysis, and lowered level of scrutiny, apply to the candidate drug testing statute involved in this case.

This Court has addressed the constitutionality of government drug testing programs in three previous cases. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School Dist. v. Acton*, 515 U.S. ___, 115

S.Ct. 2336 (1995). These decisions are appropriate precedent for the constitutional analysis of drug testing requirements imposed by governmental entities in their capacities as employer or educator of public school children. They do not, however, address the constitutionality of a drug testing program enacted pursuant to the State's power to regulate its state elections under the Tenth Amendment.

B. Because the Georgia drug testing statute imposes only reasonable, nondiscriminatory restrictions upon Petitioners' fundamental rights, it is valid under the Tenth Amendment and requires Petitioners' Fourth Amendment challenge to be analyzed under a lowered level of scrutiny.

1. The Tenth Amendment entitles Georgia to determine for itself the qualifications of its elected officials and such qualification requirements are entitled to great deference by this Court.

This Court has long recognized that under the Tenth Amendment the states retain the power to regulate their own elections. *Burdick*, 504 U.S. 428 (1992); *Gregory*, 501 U.S. 452 (1991); *see also Sugarman v. Dougall*, 413 U.S. 634 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). *Gregory* has particular significance to the issues before this Court because the state regulation in that case, as here, set qualifications for state officials. In *Gregory*, this Court upheld a Missouri constitutional provision, which set a mandatory retirement age of 70 for all state judges, against challenges brought pursuant to a

federal statute and under the Equal Protection Clause of the Fourteenth Amendment. The Court accepted the state's rational basis justification for the age-based statute.

Gregory held that this Court's scrutiny in a case raising constitutional challenges against an election statute will not be so demanding because in such cases the Court is dealing with matters which rest "firmly within a State's Constitutional prerogatives." *Gregory*, 501 U.S. at 461-63. The Court stated also that it would lower its standard of review when evaluating the validity of exclusions included in such statutes. *Id.* at 463.

In *Gregory*, the Court emphasized the significance of provisions through which a state establishes qualifications for those who seek to hold public office:

> We [have] recognized explicitly the States' constitutional power to establish the qualifications for those who would govern. . . . Such power inheres in the State by virtue of its obligation, already noted above, to preserve the basic conception of a political community. And this power and responsibility of the State applies . . . to persons holding state elective and important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

501 U.S. at 462 (internal quotations and citations omitted). *See also Taylor v. Beckham*, 178 U.S. 548 (1900); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892); *Luther v.*

Borden, 48 U.S. (7 How.) 1 (1849); *Pope v. Williams*, 193 U.S. 621, 632-33 (1904).

In *Taylor v. Beckham*, *supra*, relied upon in *Gregory*, 501 U.S. at 460, this Court held that the power of the states to prescribe the qualifications of their own officers *"should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."* *Taylor*, 178 U.S. at 570-71 (emphasis supplied). Given the state's sovereign power to establish its qualifications for those who exercise government power within the state, the relevant inquiry becomes, then, whether Georgia's candidate drug testing statute is prohibited by that which is "plainly provided by the Constitution of the United States." *Gregory*, 501 U.S. at 462, *quoting Taylor*, 178 U.S. at 571. *Gregory*, followed by this Court's decision a year later in *Burdick*, makes clear that the analysis of this issue should be pursuant to a "lowered standard of review."

2. The Georgia statute imposes only reasonable, nondiscriminatory restrictions of Petitioners' Fourth Amendment rights.

In *Burdick*, this Court held that *"when a state election provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."* 504 U.S. at 434, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (emphasis supplied). The Georgia statute meets this standard as applied to candidates and, accordingly, must be supported by important regulatory interests.

All potential candidates for the state offices which are included in O.C.G.A. § 21-2-140, as well as all political parties, *see* O.C.G.A. § 21-2-2(21), and political bodies, *see* O.C.G.A. § 21-2-2(19), know well in advance that before all candidates are eligible to run for state office, they must comply with the testing requirement within thirty days of qualification. This Court has previously noted that advance notice of the testing requirement diminishes the intrusiveness of the testing requirement. *See Von Raab*, 489 U.S. at 671-72 n. 2.

A second factor relevant to the inquiry is the extent of any invasion into the personal privacy of the individual in the giving of the specimen. The procedures of the Georgia testing program provide almost complete privacy during the collection process. The statute incorporates the federal regulations, which decreases the intrusiveness of a drug testing scheme. *Von Raab*, 489 U.S. at 660-61 n. 1. There is no testing for the presence of any other drugs or medications or to identify any physical or medical conditions. Again, these characteristics of the program significantly decrease the burden on the candidate's privacy interests. *Id.* at 671-72 n. 2.

In order to allow the candidate to make the decision whether to submit the test results in order to qualify to run for state office, such results are sent *directly and only to the candidate*. The testing schemes at issue in *Skinner*, *Von Raab*, and *Vernonia* were approved by this Court where the test results were sent either to the government employer or to various school officials. *See Skinner*, 489 U.S. at 610; *Von Raab*, 489 U.S. at 663; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2389. Certainly, the retention by the

potential candidate of the right of total control of disclosure of a positive test result renders the Georgia testing program far less intrusive of the candidate's privacy rights than the regulations involved in those cases.

An additional consequence of the procedure calling for the test results to be sent only to the candidate is that a positive test result is not made available to any law enforcement agency or any agency responsible for criminal prosecution. The nondisclosure of the results of the tests to third parties, who might use it to the disadvantage of the individual tested, is another factor which serves to decrease the intrusiveness of the drug test upon the individual's privacy interests. *See Von Raab*, 489 U.S. at 662; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2393.

The Georgia candidate drug test procedures maintain the privacy of the individual during the giving of the urine sample, limit the information revealed by the analysis of such sample, and place in the hands of the potential candidate the decision whether such information will be released to any other party. These procedures insure that the drug testing requirement constitutes a reasonable intrusion upon the potential candidate's Fourth Amendment right to be free from unreasonable search and seizure.

The next issue under *Burdick* is whether the drug testing statute is discriminatory in the imposition of the restrictions against which complaints are raised. The requirement applies across the board to all potential candidates covered by the statute, regardless of their party affiliation, race, gender, or other individual characteristics. *No* candidate who refuses to take the test or who

tests positive for illegal drugs (unless such positive test result is explained by a physician to be the result of prescribed medication) is permitted to qualify to run for the state offices. The statute does not discriminate between potential candidates who agree with the legitimacy of the drug testing requirement and those who oppose it. Petitioners make no argument that it is not applied uniformly or that, as candidates of the Libertarian Party, their right to be free from unreasonable search and seizure is burdened more heavily by the statute than is the same right of members of the two major parties.

Georgia's candidate drug testing statute imposes a reasonable and nondiscriminatory invasion of the Fourth Amendment rights of the potential candidates and, under *Gregory* and *Burdick*, the statute constitutes only a slight burden upon Petitioners' fundamental rights.

3. The drug testing statute serves important state interests.

The interests which justify requiring potential candidates for state office to submit to drug testing are important and, indeed, compelling. Apparently no federal court, other than the lower courts in this case, has considered the constitutionality of a drug testing program in the context of the power accorded the states under the Tenth Amendment to determine for themselves the qualifications of their governing officials or addressed the issue of the nature of state interests which are required to justify drug testing of potential candidates to state elective offices.

Under Georgia's Constitution, "[p]ublic officers are the trustees and servants of the people and at all times are amenable to them." Art. I, Sec. II, Par. I, Georgia Constitution of 1983 (included in Appendix at A-10.). In *Malcolm v. Webb*, 211 Ga. 449 (1955), Georgia's Supreme Court emphasized that the state's public officers, as servants and trustees, are bound to "exercise [their] best judgment and skill." *Id.* at 456. "The office was not forced upon them, but was voluntarily assumed." *Id.* Quoting Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928), the *Malcolm* court noted that:

> 'A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
>
> * * *
>
> Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'

Id. at 456.

This Court has previously recognized drug abuse as one of the most serious problems facing society today, *Von Raab*, 489 U.S. at 674, and has also emphasized the role of governing officials in "the formulation, execution or review of broad public policy functions." *Gregory*, 501 U.S. at 462. Inherent in the state's right to determine for itself the qualifications it will demand for persons seeking to perform these important functions is the right to insist upon candidates who, if elected, will serve their

constituents with the utmost trust, integrity, competence, loyalty, and sound judgment. As this Court has discussed in each of its three previous drug testing cases, use of illegal drugs impacts tremendously each of these necessary characteristics.

Illegal drug use draws into question an individual's physical fitness and "integrity and judgment." *Von Raab*, 489 U.S. at 670. State officials who must submit to the drug testing requirement each have some power or influence which could be affected by the use of illegal drugs or could make such individual more susceptible to influence by those from whom such illegal drugs are obtained or who traffic in illegal drugs. The danger lies, not in the "stroke of a pen," Brief of Amici Curiae American Civil Liberties Union et al., at 9, but in the wielding of power and the making of decisions concerning activities either directly or indirectly related to the use of illegal drugs including arrests, convictions, and enactment of legislation. Other state officials may be likewise affected where their responsibilities include involvement in the creating of drug enforcement policy; inspecting goods coming into and going out of the state; determining agency budgets; hiring and firing personnel; or entering into contracts on behalf of the state. Each of the elected positions included in the definition of "state office" in O.C.G.A. § 21-2-140(a)(4) wields power that can be so influenced.

The nation's and the state's interest in fighting the drug war can be damaged by the state officer's use of illegal drugs or the officer's complicity with those involved in the importation and sale of illegal drugs. *See Von Raab*, 489 U.S. at 670. The Eleventh Circuit elaborated

on how Georgia's governor, lieutenant governor, commissioner of agriculture and members of the General Assembly may be adversely affected by use of illegal drugs. *Chandler v. Miller*, 73 F.3d 1543, 1546 (11th Cir. 1996). The lower appellate court noted that these "positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard.' " *Id.*, *quoting Von Raab*, 489 U.S. at 674.

This rationale applies with equal strength to candidates for the elected positions of superior and appellate court judges and district attorneys. District attorneys prosecute drug users on a daily basis – the opportunity for bribery, blackmail, or simply bias in favor of defendants charged with drug crimes is obvious. Similarly, trial and appellate court judges, due to their involvement in the pretrial, trial, sentencing, and appeals by drug criminals, are vulnerable to influence. The state has an important interest in insuring that these public officials are drug free and, therefore, less vulnerable to undue influence from those involved in the drug culture.

The enactment of O.C.G.A. § 21-2-140 bears a relationship to the problems experienced in Washington, D.C., because of the illegal drug use by Mayor Marion Barry. The 1990 General Assembly enacted O.C.G.A. § 21-2-140 which was signed by the governor and became effective on April 16, 1990. 1990 Ga. Laws 2015. Mayor Barry had been indicted on February 15, 1990, less than two months before the approval of the Georgia statute, on charges of possession of cocaine and various other drug-related crimes. *United States v. Barry*, 938 F.2d 1327, 1329 n. 1 (D.C. Cir. 1991). Mayor Barry's arrest and the publicity which accompanied that arrest serve as an example of

the importance of avoiding, to the extent possible, the dangers posed to the public by the use of illegal drugs by Georgia elected officials.

Mayor Barry was convicted on August 10, 1990, and was subsequently sentenced to six months in jail. *Id.* Barry twice appealed the sentence and the Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision in two opinions. *United States v. Barry, supra* (*"Barry I"*); *United States v. Barry*, 961 F.2d 1327 (D.C. Cir. 1992) (*"Barry II"*). The comments of the district court as it sentenced Mayor Barry are relevant to those interests which justify Georgia's candidate drug testing requirement:

> Of greatest significance to me in sentencing this defendant is the high public office he has at all relevant times occupied. . . .
>
> *His breach of public trust alone warrants an enhanced sentence . . .*
>
> Moreover, the prevalence of the public rumors of defendant's frequent and conspicuous drug use – never dispelled, and now unfortunately shown to be true – *has given aid, comfort, and encouragement to the drug culture at large, and contributed to the anguish that illegal drugs have inflicted on this city in so many ways for so long.*

Barry I, at 1331 n. 4; *Barry II*, at 265 (emphasis supplied).

In *Barry I*, the Court of Appeals for the District of Columbia Circuit affirmed the district court's statement in its sentencing order that the mayor "let down the community and gave 'aid, comfort, and encouragement to the drug culture at large.' " *Id.* at 1337. The mayor and his counsel had admitted that he had "failed as a role

model . . . and had disappointed the community." *Id.* at 1338. Barry had further admitted that "his actions had caused 'the citizens of [Washington D.C.] shame and enormous pain' and that his behavior 'hurt, confused and disappointed young people.' " *Id.* Undoubtedly, the mayor's drug problems affected tremendously his capacity and motivation to carry out his duties of protecting the liberty, safety, economic well-being of the public and enforcing the laws on their behalf. While a pre-qualifying drug test cannot eliminate problems caused by elected officials who use illegal drugs during their term of office, such test can serve to identify, before the fact, potential candidates who have severe and perhaps uncontrollable drug problems.

Mayor Barry serves as a prime example of how the public's confidence and trust in its elected officials can be easily abused by such officials' involvement with illegal drugs. Surely Georgia has an important and legitimate interest in avoiding to the extent possible the identical problems which would arise if a Georgia elected official were discovered, after he or she was elected, to be addicted to illegal drugs: shame and enormous pain and anguish to the citizens of this state and hurt, confusion, and disappointment to the state's young people who should be looking at their leaders as role models to be admired and followed.

Certainly, a state can seek to identify *before their election to office* individuals who because of their drug use may have ties to drug users or importers or who may otherwise bring "aid, comfort, and encouragement to the drug culture at large." *Barry I*, 938 F.2d at 1337; *see also Werme v. Merrill*, 84 F.3d 479, 487 (1st Cir. 1996) ("States

are free to head off potential problems in the electoral system before they materialize, as long as the solutions that the state devises are reasonable and do not significantly intrude upon constitutionally protected rights.")

This Court's previous drug testing cases all noted the deterrent effect that drug testing programs may have. *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395; *Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 628. Georgia's candidate drug testing statute serves the objective of deterring potential candidates who, without the drug testing requirement, might be elected to public office and who would be more likely than their fellow elected officials to abuse the power and trust of that position as a consequence of their use of illegal drugs.

As shown above, there are important state interests which justify the statute and which render it constitutional. In answer to Petitioners' argument that the statute serves only as a symbolic gesture reflecting the state's anti-drug policy,[1] "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Turner Broadcasting System, Inc. v.*

---

[1] This conclusion as to the legislative intent underlying O.C.G.A. § 21-2-140 is based upon a law review article which purports to quote the comments of one state legislator which were made in a telephone interview after the passage of the statute. Petitioners' brief at 20 n. 4. This Court has long made it clear that it will give scarce significance to such post-enactment remarks as to legislative intent. *Wright v. West*, 505 U.S. 277 (1992), at 295 n. 9; *see also Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 n. 3 (1982) and cases cited therein.

FCC, 512 U.S. ___, 114 S.Ct. 2445, 2464 (1994), *quoting United States v. O'Brien*, 391 U.S. 367, 383 (1968).

The Tenth Amendment guarantees Georgia the right to offer to its citizenry assurance that the individuals chosen to hold public office are not likely to violate the trust and confidence needed to perform the duties and responsibilities of their offices because of problems stemming from the use of illegal drugs. The state's constitutional right to determine for itself that only candidates who will offer this minimum assurance of trust, integrity, and sound judgment may run for the specified public offices constitutes the important interest necessary to justify Georgia's candidate drug testing statute.

Georgia has shown that its drug testing statute imposes only reasonable, nondiscriminatory restrictions of Petitioners' rights and that it is justified by important, indeed compelling, state interests. Accordingly, the statute is a valid exercise of the power guaranteed under the Tenth Amendment. Moreover, Georgia's statute is entitled to a low level of scrutiny in this Court's analysis of its constitutionality under the Fourth Amendment.

C. The Candidate Drug Testing statute is valid under the Fourth Amendment because its minimal intrusions into the potential candidate's legitimate expectations of privacy are substantially outweighed by important state interests.

This Court's previous drug testing cases teach that a government drug testing program is constitutionally valid where there is a special need, beyond the normal needs of law enforcement, which justifies a departure

from the ordinary warrant and probable cause requirements of the Fourth Amendment. *Skinner*, 489 U.S. at 619, 620; *Von Raab*, 489 U.S. at 665; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2391. A "special need" exists, in turn, where the public interest in the government program outweighs the privacy concerns implicated by the tests, without reference to the usual presumption in favor of the procedures specified in the Fourth Amendment's warrants clause. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-66; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2391.

In each of these previous cases, this Court found the existence of such a special need justifying the drug testing in the absence of a warrant or probable cause. In *Skinner*, the Court approved urine and blood testing of railway workers, finding a special need in the safety interests of the workers themselves as well as the general public. 489 U.S. at 260. *Von Raab* approved a United States Customs Service policy which required drug testing of all employees who sought promotion to positions which involved direct participation in drug interdiction activities or required possession of a firearm while on duty. 489 U.S. at 660-61. *Vernonia* approved scheduled and random urine drug testing of student athletes throughout an Oregon school district. 515 U.S. at ___, 115 S.Ct. at 2388-91. The Court had no difficulty in determining that the school setting constituted a "special need" justifying a search without warrant or probable cause. *Id.*, 515 U.S. at ___, 115 S.Ct. at 2391.

The analysis of the legitimacy of the special need asserted by Georgia is entitled under the Tenth Amendment to the special deference and lowered level of scrutiny recognized in *Burdick* and *Gregory*. These cases teach

that Georgia must justify its election statute with important state interests and, by extension to the drug testing context, they require that the special need justifying Georgia's statute be analyzed under a less strict standard than that used by the Court in its three previous drug testing cases.

As discussed above, *supra* at 11-18, there are important interests which justify disqualification of potential candidates who use illegal drugs. These important justifications constitute a "special need" which is as compelling as were the special needs approved by the Court in *Skinner*, *Von Raab*, and *Vernonia*. Contrary to the argument urged by Petitioners, use of illegal drugs by state elected officials has significant and far reaching consequences to the citizens of Georgia and to the operations of governmental functions within the state.

Skinner and its progeny next require balancing the legitimate privacy interests of the potential candidates which are impacted by the testing requirement against the asserted interests sought to be served by the testing program. *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2390. Those privacy interests which are considered by society to be legitimate, and therefore entitled to Fourth Amendment protection, vary with context. 515 U.S. at ___, 115 S.Ct. at 2391. Furthermore, the legitimacy of such privacy interests may be dependent upon the individual's legal relationship with the State. *Id.*

In its discussion of the *Burdick* test, Georgia addressed in some detail the impact of the drug testing requirement upon candidates' Fourth Amendment rights. *See supra* at 8-11. A closer examination of the issue, under

the principles established in *Vernonia*, leads to the conclusion that the legitimate privacy interests of candidates to public office are very limited.

Perhaps most relevant to the degree of privacy legitimately expected by candidates to public office is that the candidates are qualifying to be elected to *public office*. The very nature of political campaigns, particularly where an individual has opposition, is a thorough and sifting examination of the candidate's qualifications to hold office. This examination is conducted not so much by the government as by the public and the media, and includes more than a determination of the candidate's political positions. The questions of integrity and competence may be primary factors in the voters' decisions about which candidate they choose to support.

This Court has recognized the public's right to information about those who choose to run for political office. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1970), and *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1970), this Court held that publications concerning candidates must be given the same heightened protections afforded by *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) to publications which discuss public officials. The Court in *Monitor Patriot* emphasized that "*[a]nything* which might touch on an official's fitness for office" is knowledge relevant to the electorate. *Id.*, 481 U.S. at 273, *quoting Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964) (emphasis supplied). Further,

> [f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these

> characteristics may also affect the official's private character.

Monitor Patriot, 401 U.S. at 273-74, *quoting Garrison*, 379 U.S. at 76-77.

Until individuals decide to enter politics, the private nature of such personal matters remains inviolate. Once such individuals choose, however, to enter the political arena, they give up their right to privacy to a very large extent and cannot complain about the public's demand for knowledge concerning their "private character." A candidate "concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight." *Nixon v. Administration of General Services*, 433 U.S. 425, 455 (1976), citing *New York Times*. The public is entitled to know "anything which might touch on [the candidate]'s fitness for office," *Garrison*, 379 U.S. at 76-77, including his or her use of illegal drugs.

A second factor which diminishes the candidates' privacy expectations is the control the candidates exercise over whether they will subject themselves to the drug testing requirement. No one is forced to become a candidate. That candidates voluntarily decide to run for office is a significant factor which decreases the candidates' legitimate privacy interests. *See Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2392 ("By choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation ever higher than that imposed on students generally"); *Von Raab*, 489 U.S. at 671-72.

Under Georgia law, candidates for state office are required to file extensive financial disclosure statements

with appropriate state election offices. O.C.G.A. § 21-5-50(c)(1). Candidates must disclose specific details about fiduciary positions they may hold, all business interests in which they hold a certain ownership interest, real estate holdings above a certain value, and transactions with the state totaling a certain annual value. These regulations apply either to the candidate alone or, in some cases, to his family and business. Finally, candidates for public office, including state officers, are also subject to pervasive regulation and disclosure requirements with respect to campaign contributions of more that $101.00. *See* O.C.G.A. § 21-5-30 *et seq*.

These regulations may be considered by some candidates much more intrusive than the drug testing requirement because they may feel that nothing is entitled to more privacy than their personal financial affairs. These disclosure requirements are highly intrusive but are nonetheless constitutional. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Igneri v. Moore*, 898 F.2d 870, 873-74 (2nd Cir. 1990). The state's inquiry into these personal matters resembles the extensive background checks required of applicants for certain federal government positions. Courts have recognized that submission to such background checks as a prerequisite to employment significantly lowers an individual's privacy interests for Fourth Amendment purposes. *See Von Raab*, 489 U.S. at 677; *National Treasury Employees Union v. United States Customs Service*, 27 F.3d 623, 629 (D.C. Cir. 1994).

Two additional aspects of the privacy expected by an individual subjected to a drug test are the degree of intrusiveness of the testing procedures and the information revealed by the test. *Vernonia*, 515 U.S. at ___, 115

S.Ct. at 2393. The procedures utilized in the Georgia test are highly protective of the candidate's privacy interests inherent in the matter of bodily excretory functions and assure that the only information revealed by the test is the presence of the five designated drugs.

The voters' right to information concerning candidates, when combined with the decrease in their personal privacy which potential candidates know will occur once they voluntarily enter politics and the minimum intrusiveness of the testing procedures themselves, requires the conclusion that the Georgia drug testing statute constitutes only a slight intrusion into the legitimate privacy rights of potential candidates.

Against this low intrusion on privacy must be weighed the interests asserted by Georgia as justification for its candidate drug testing statute. While these interests are compelling, the analysis above shows that the statute may be upheld as constitutional by this Court by interests which are deemed to be important. *Burdick*, 504 U.S. at 434. The *Burdick* decision should be considered in conjunction with the holding of this Court in *Vernonia* where Justice Scalia, writing for the majority, observed that the state's interest need not necessarily be compelling but must only appear "*important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2394-95 (emphasis in original). The statute at issue here has previously been shown *not* to be "relatively intrusive upon a genuine interest of privacy."

Georgia has discussed at length above, *supra* at 11-18, the state interests which justify its candidate drug testing statute. The absence of a history of drug use by state elected officials does not detract from these important interests. *See Von Raab*, 489 U.S. at 674; *see also Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. Petitioners here cannot argue, any more than could the petitioners in *Von Raab*, that elected officials are "immune from this pervasive social problem." *Id.*

This Court's opinions emphasize that in order to be valid under the Fourth Amendment, the drug testing program is not required to be the most effective way of identifying illegal drug use. *Von Raab*, 489 U.S. at 673-76; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. It is enough that the drug testing program serve to a reasonable extent the objectives sought to be achieved by the statute. The drug testing program established in Georgia is substantially similar to the railway, Customs Service, and school programs approved by this Court and its efficacy must be assumed to be substantially similar as well. This Court, in a similar vein, has also made clear that absolute deterrence is not necessary for the statute to be constitutional. *Skinner*, 489 U.S. at 629-30; *Von Raab*, 489 U.S. at 674-75; *Vernonia*, 515 U.S. at ___, 115 S.Ct. at 2395. Georgia's statute can be assumed to deter some individuals who use illegal drugs from attempting to qualify to run for state office and therefore serves important state interests.

In summary, the important state interests in conducting such pre-qualification drug testing include providing significant information to voters about the trustworthiness, integrity, honesty, and judgment of candidates for public office, which information will serve to avoid the

loss of trust, confidence, and faith in government and a tragedy such as that experienced by Washington, D.C.; the incompatibility of illegal drug use and the power and trust which are held by those who are elected to state office; avoidance of problems which would quite likely result from use of illegal drugs by elected officials; and, finally, deterrence of drug use by such officials. These interests are sufficiently important to meet both the requirements of the test established in *Burdick* for the constitutionality of a state elections statute under the Tenth Amendment as well as the test in *Vernonia* for the constitutionality of a drug testing regulation under the Fourth Amendment. These important interests outweigh the slight invasion of the limited legitimate privacy interests of potential candidates to state elective office. Accordingly, this Court should affirm the decision of the Eleventh Circuit that the statute does not violate the Fourth Amendment.

II. THE CANDIDATE DRUG TESTING STATUTE IMPOSES NO RESTRICTIONS UPON PETITIONERS' FIRST AMENDMENT RIGHTS AND, ASSUMING IT DOES, IT IS A CONTENT-NEUTRAL SPEECH REGULATION WHICH IMPOSES ONLY MINIMAL BURDENS ON SPEECH RIGHTS AND IS JUSTIFIED BY IMPORTANT STATE INTERESTS.

As the persons claiming a state-imposed infringement of their right to engage in assertively aggressive conduct, it is Petitioners' burden to show that the Georgia drug testing statute has any impact on First Amendment rights. *Clark v. Community for Creative Non-Violence*, 468

U.S. 288, at 293 n. 5 (1984). Petitioners presume that requiring candidates to submit to a drug test when they strongly disagree with its validity results in a content-based restriction on free speech. If this presumption is incorrect, as Georgia contends, then Petitioners have failed to raise a First Amendment issue.

In *United States v. O'Brien*, 391 U.S. 367, 376 (1968), this Court rejected the claim of a Vietnam war protester that the burning of his draft card constituted protected "symbolic speech." This is the precise position espoused by Petitioners here – their disagreement with and desired refusal to submit to the drug testing requirement constitute "expressive conduct." *O'Brien* plainly disavowed "the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends to thereby express an idea." *Id.* at 376.

In support of their "symbolic speech" argument, Petitioners rely upon this Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989). In order for the *Texas v. Johnson* case to have any relevance to the issues before this Court, the act of submission to the drug test or the refusal to do so must reflect "an intent to convey a particularized message," 491 U.S. at 404, and there must be a great likelihood "that the message would be understood by those who viewed it." *Id.* The Court in that case had no difficulty in finding that the burning of the American flag, an object long endowed with great symbolism, conveyed a specific message and that such message would be understood by all who witnessed the act. *Id.* The same conclusion cannot be drawn here.

Compliance or refusal to comply with the testing requirement when one is opposed to the legality of the test cannot be analogized to the burning of the United States flag. A potential candidate's decision to comply with the drug testing requirement or to refrain from doing so could be based upon an indefinite number of reasons other than opposition to the statute. Such decision does not convey any particularized message. Certainly no message would be perceived, much less understood, by the electorate without further elaboration by the candidate, that is, without exercise of the candidate's right to freedom of speech, which remains free and unabridged by O.C.G.A. § 21-2-140.

Petitioners' argument that submission to the drug testing requirement or refusal to do so constitutes expressive conduct protected by the First Amendment has broad consequences. Any citizen could argue that his political opposition to a given statute or regulation would compel invalidation of the statute because forced compliance would send a message. This Court, however, has recognized the far-reaching effects of such a holding and has rejected it in various contexts even where fundamental rights such as freedom of religion and freedom of the press are involved. "If prohibiting the exercise of religion [by prohibiting use of peyote] (or burdening the activity of printing) is not the object of the [regulation or] the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Division v. Smith*, 494 U.S. 872, 878 (1989).

Petitioners have failed to satisfy their initial burden of showing that the Georgia drug testing statute impacts

in any respect their right to free speech. Assuming, for the sake of argument only, that the statute raises a First Amendment issue, it must initially be kept in mind that the statute was enacted by the Georgia General Assembly pursuant to the power accorded the state under the Tenth Amendment to determine for itself the qualifications of its elected officials. Using the lowered standard authorized under *Burdick* and *Gregory*, this Court must determine whether the statute constitutes a content-neutral or, as Petitioners contend, a content-based speech regulation.

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. at ___, 114 S.Ct. at 2459, this Court reiterated the distinction between content-based and content-neutral regulations:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, *laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.*

Id. (Emphasis supplied).

The Georgia candidate drug testing statute, to the extent it imposes any burdens on speech, does so without reference to any idea or view expressed by any candidate and is, therefore, a content-neutral regulation. *See Clark v. Community for Creative Non-Violence*, 468 U.S. at 288. The Georgia statute can be contrasted with the regulation under attack in *McIntyre v. Ohio Elections Comm*, 514 U.S. ___, 115 S.Ct. 1511 (1995), where this Court struck down on First Amendment grounds an Ohio election statute banning all anonymous campaign literature. Although

recognizing the deference given to the states to control their own elections, the *McIntyre* Court considered the statute to be a regulation of pure speech and, therefore, content-based, rather than one governing "the mechanics of the electoral process" as had been involved in *Burdick* and *Gregory*. 514 U.S. at ___, 115 S.Ct. at 1517. The statute therefore did not qualify for the lower scrutiny which had been applied to the election statutes at issue in those earlier cases. 514 U.S. at ___, 115 S.Ct. at 1518.

Turner holds that a content-neutral regulation is valid where:

> it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

512 U.S. at ___, 114 S.Ct. at 2469.

Georgia's interests in identifying, disqualifying and deterring users of illegal drugs from running for state elected office are important. These interests are unrelated to the suppression of speech. Finally, the minimal restriction of Petitioners' free speech rights is essential in order for Georgia to achieve its described goals. Accordingly, under the test set forth in *Turner*, O.C.G.A. § 21-2-140 is a valid content-neutral regulation.

The statute at issue in this case is distinguishable from the Georgia statute which was struck down in *Bond v. Floyd*, 385 U.S. 116 (1966). Unlike the statute at issue in *Bond*, the candidate drug testing statute does not mandate that a potential candidate keep silent his views of the

legitimacy or efficacy of the statute or any other policy position. It does not require that he or she agree publicly with the State's position with respect to the statute, nor does it demand proof of the candidate's sincerity of his or her oath to uphold the federal or state constitutions. *See Bond*, 385 U.S. at 132.

The Georgia candidate drug testing statute does not affect speech rights in any way; even assuming it does, under *Turner*, it is a valid content-neutral speech restriction. Under *Burdick*, in turn, it imposes only reasonable restrictions on Petitioners' speech rights and such restrictions are justified by important state interests. The statute does not violate the free speech rights of potential candidates and the decision of the Eleventh Circuit on this issue should be affirmed.

CONCLUSION

For all of the above and foregoing reasons, Georgia prays that the judgment of the Eleventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MICHAEL E. HOBBS 358200
Deputy Attorney General

DENNIS D. DUNN 234098
Senior Assistant Attorney General

PATRICIA GUILDAY 315113
Assistant Attorney General
Counsel of Record for Respondents

APPENDIX

INDEX TO APPENDIX

Page

O.C.G.A. § 21-2-140 ..... A-1

Joint Statement of Undisputed Facts A-4

U.S. Const., Amend. X A-7

U.S. Const., Amend. IV A-8

U.S. Const., Amend. I A-9

Art. I, Sec. II, Par. I, Georgia Constitution of 1983 ..... A-10

O.C.G.A. § 21-2-140

21-2-140. Mandatory drug testing for candidates.

(a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53, Fed. Reg. 11979, et seq., as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine; opiates; amphetamines; or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate with the officer with whom such candidate, qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates, provided, however, that upon submission of a valid pauper's affidavit and a valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00, No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with a political party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State as such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 21-2-140, enacted by Ga. L. 1990, p. 2015, § 1; Ga. L. 1992, p. 1612, §§ 1-3.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALKER L. CHANDLER, SHARON T. HARRIS and JAMES D. WALKER, Plaintiffs,	*	CIVIL ACTION NO. 1-94-CV-1298-ODE
v.	*	
ZELL MILLER, Governor of Georgia; MAX CLELAND, Georgia Secretary of State; and JAMES G. LEDBETTER, Commissioner, Department of Human Resources, Defendants.	*	

JOINT STATEMENT OF UNDISPUTED FACTS

Plaintiffs and Defendants, by and through their undersigned counsel, agree for purposes of entry of Final Judgment that the facts set forth below are undisputed and constitute the evidence of record for purposes of an appeal taken in this matter.

1. During the 1990 session of the General Assembly of Georgia, O.C.G.A. § 21-2-140 was enacted which requires any person seeking to qualify for nomination or election to a state office to file a certificate stating that the candidate has been tested for illegal drugs within 30 days prior

to qualifying and that the results of the test are negative. (Copy of O.C.G.A. § 21-2-140 attached as Exhibit A.)

2. Under O.C.G.A. § 21-2-140(a)(4) the state offices to which the testing requirement applies are: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court and Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

3. The statute requires the collection and testing of the fluid samples administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53, Fed. Reg. 11979, et seq.) or professionally valid procedures.

4. Candidates for the offices listed above are informed that the required testing may be conducted either on the site of an approved medical testing laboratory or in the privacy of the candidate's physician's office. The procedures included in the above Federal Regulations for collection of the specimen are adhered to at both collection sites, including those intended to guarantee the privacy of the potential candidate.

5. The specimen is sent by the lab or the physician's office to an approved laboratory for testing. All chain of custody procedures are complied with fully. (*Id.*) A five panel drug screen is performed. The certificate contemplated by the statute does not include a detailed chemical analysis of the candidate's urine, or other bodily fluids,

but merely provides that a drug screen has been performed and that the results are negative, except as necessary to explain any positive drug test results.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing JOINT MOTION FOR ENTRY OF FINAL JUDGMENT, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed to plaintiffs' counsel of record, to wit:

Walker L. Chandler, Esq.
P.O. Box 7
Zebulon, Georgia 30295

Harvey Harkness, Esq.
P.O. Box 497
Marietta, Georgia 30061-0997

This 18th day of January, 1995.

/s/ Patricia Guilday
PATRICIA GUILDAY
Assistant Attorney General

Tenth Amendment to the United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Art. I, Sec. II, Par. I, Georgia Constitution of 1983

Paragraph I. Origin and foundation of government.

All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.

(9)

Supreme Court, U.S.
FILED
DEC 27 1996
CLERK

No. 96-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

WALKER L. CHANDLER
ROBERT E. TURNER
Counsel of Record
120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
(770) 567-3882

Attorneys for Petitioners

20 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1-2
ARGUMENT	3
CONCLUSION	16

TABLE OF AUTHORITIES

cases:

Burdick v. Takushi, 504 U.S. 528 (1992)... 2,4,5

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 2,4,5,6

Malcolm v. Webb, 211 Ga.449 (1955)..... 13

Monitor patriot Co. v. Roy, 401 U.S. 265 (1970)..... 12

National Treasury Employees union v. Von Raab 489 U.S. 656, (1989)..... 6,7,10,,11,13,14,16

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 12

Ocalla Star Banner Co. v. Damron, 401 U.S. 298 (1970). 12

Skinner v. railway labor Executives' Ass'n, 489 U.S. 602 (1989)..... 6,11,16

Vernonia School District v. Acton, 515 U.S. ____, 115 S.Ct. 2386 (1995)..... 6,11,12,16

Wolf v. Colorado, 338 U.S. (1949)..... 5

FFEDERL REGULATION

53 Fed. Reg. 11979 (29988) §2.2(f) (1988)..... 8, 9

STATE STATUTE

O.C.G.A. 21-2-140..... 8,17

No. 96-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L.CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF ARGUENT

1. The cases of *Burdick v. Takushi*, 504 U.S 528 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) have no application in this case to the First Amendment right to free speech or the Fourth Amendment right of the individual to be free from unreasonable search by the government. p. 4

2. The legitimate privacy expectations of a candidate are not diminished in similar fashion to the persons involved in drug testing in Von Raab, Skinner and Acton. p. 6

3. The intrusion on the legitimate privacy interest of the candidates is not diminished by the manner in **which** the urine specimen is collected or by the fact that a candidate must disclose financial information. p. 8

A. The mere possibility that a candidate may be involved in a criminal activity adds no substantive weight the government interest relative to the weight of the individual's Fourth Amendment rights. p. 11

B. The Respondents are incorrect in their argument that the privacy interest of a potential candidate is decreased substantially because they are seeking to be elected to public office. p. 12

4. Almost all elected politicians have the potential to do harm to the people in some way because of their elected position. But, because of all the safeguards of law enforcement with the ability to make warranted and suspicion based searches, the scrutiny given to candidates by the public and the media, and finally the protection of the Fourth Amendment, the weight of government's interest is much less than the weight of the individual's Fourth Amendment right. p. 14

ARGUMENT

1. The cases of *Burdick v. Takushi*, 504 U.S 528 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) have no application in this case to the First Amendment right to free speech or the Fourth Amendment right of the individual to be free from unreasonable search by the government.

As set forth in *Burdick*:

> A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson v. Celebrezze*, 460 U.S. 780, 788-789. Under this standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters right to "*severe*" restrictions. *Norman v. Reed*, 502 U.S. ___,___."

***Burdick*,** 504 U.S 528 (1991). *Burdick* simply speaks to voters rights under the First and Fourteenth Amendment as to the setting of qualification for a candidate. *Burdick* does not lower the standard specifically for the individual's First and Fourth Amendment rights. The Court held specifically that Hawaii could place the

restriction to ballot access providing that no candidate is allowed to be a write in candidate. The Fourth Amendment was made applicable to the state in *Wolf v. Colorado* 338 U.S. 25 (1949). The Fourth Amendment rights of an individual were not made applicable to the state in any lesser degree than any other fundamental right. No case provides such. No case provides that a lesser standard is applied to state laws in respect to the First Amendment right of the individual to freedom of speech or the Fourth Amendment right to be free from unresonable search by the government.

The issue in ***Burdick, 504 U.S. 528,*** is whether the disallowance of write in voting is a violation of voters' First and Fourteenth Amendment rights to associate politically through the vote and to have their choice placed on the ballot and the case revolves around the manner in which votes are actually collected, specifically Hawaii's prohibition on write in voting. The Petitioner does not challenge the State of Georgia's right to prescribe the method in which the votes are gathered.

In *Gregory*, 501 U.S. 452, the Court held that a state could require judges to retire at age 70. *Gregory* held that " [t]he authority of a state's people to ***determine the qualifications*** of their most important government officials lies 'at the heart of representative government' and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV. [Citations omitted]." Id. at 452. The Petitioners do not argue a state does not have the right to set the reasonable qualifications for office. One such qualification might well be that the candidates do not participate in any

illegal act such as the use of drugs, or the qualification could be a candidate can not be convicted felon. But the state has no right to violate the candidate's Fourth Amendment by making an unwarranted and suspicionless search unless a compelling interest is found as was found in *National Treasury Employees union v. Von Raab*, 489 U.S. 656, (1989) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) This *Gregory*, 501 U.S. 452 case is not substantively relevant to the issues present case before the Bar.

2. The legitimate privacy expectations of a candidate are not diminished in similar fashion to the persons involved in drug testing in *Von Raab, Skinner and Acton.*

The respondents contend that because the appellants/candidates knew they would be forced in submit in advance to the search, that inherent intrusiveness or degradation of the search is diminished, citing *Von Raab*, 489 U.S. 656. Respondent's Brief, p. 9. The *Von Raab* majority's specific statement is that "we do not believe that these [privacy] expectations outweigh the government's *compelling* interests in safety and in the integrity of our borders." Emphasis added, *Von Raab* 489 U.S., at 672. In *Von Raab*, note 2, *Id.*, the Court minimizes the intrusion of the test upon the privacy on the agents. In the Courts discussion of the balancing of the state's interests and the individual's rights, the Court is cognizant of the conditions of the entire job. As pointed out in the Petitioner's brief, p. 11, the Court in *Von Raab*, 489 U.S., at 669, noted that the persons being tested are persons on the "front line of the drug war" who carry firearms. Id. This testing is allowed in part

because of the physical nature and preciseness of execution of the job required of the agents. According to this Court, these men are essentially required to meet the conditions of a soldier at war. The compelling interests involved are stated by the Court as follows:

> [T]hose who join our military or intelligence services may be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquires into their physical fitness for those special positions. [Citations omitted.]
>
> We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their *fitness*. [Emphasis added]

Von Raab, 489 U.S., at 672. While the Court prefaced its statement that the privacy expectations of the drug agents did not outweigh the Government's compelling interests based on the fact of the immediate requirements

of the agent's work involving fitness and probity, the conditions of the work of candidates in the present case are unlike the drug agents situation. The candidates are not directly dealing daily with the issue of drugs in a situation that involves firearms where physical dexterity is important, impacting life-and-death split second decisions that have to be made. Typically decisions are made in a slower more deliberate fashion and most or all of a candidate's work will not involve drug interaction. Decisions are typically made in conjunction with other people. Because of the nature of the of the a political candidates work, there is no immediate great danger and there is no requirement of physical fitness in the nature of a soldier. From a common sense point of view and, also, simply a direct examination of the facts, a candidate can not and should not expect a search of his bodily fluids simply because he is a candidate for political office. An elected official's job does not involve the physical fitness of an individual. The candidates are not involved in a heavily regulated industry, that is so regulated partly because of great potential danger to life and property.

3. **The intrusion on the legitimate privacy interest of the candidates is not diminished by the manner in which the urine specimen is collected or by the fact that a candidate must disclose financial information.**

The urine testing procedures provided by O.C.G.A. § 21-2-140, 53 Fed. Reg. 11979 (1988), are a substantial invasion of privacy of an individual involved in an excretory function. " There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk

about it at all." *Skinner*, 489 U.S. at 617 The urine collection procedure required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (29988) § 2.2 (f) are substantively invasive of an individual's personal dignity. A candidate must: remove all unnecessary outer garments; wash and dry his or her hands; prior to providing the specimen, "remain in the presence of the collection site person and . . . not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other material which could be used to adulterate the specimen"; and provide the specimen in a stall or otherwise partitioned area. Prior to urination, the person collecting the specimen must observe the prospective candidate and note any unusual behavior or appearance. *Id.* The person collecting the specimen also must remain in the room during urination, outside the stall or partition. Within four minutes after urination, the temperature of the specimen is gauged. *Id.* Finally, if tampering is suspected, then a second specimen must be provided under direct observation. Id. These procedures do not "insure that the drug testing requirement constitutes a reasonable intrusion upon the potential candidate's Fourth Amendment right to be free from unreasonable search and seizure." Respondent's brief, p. 10.

The respondent's brief, pp. 18-23, and the amicus brief of the United States, pp. 20-23, argue that the individual candidate's privacy interest is diminished by the fact of the requirements of financial disclosure. This Court has recognized the high level of privacy intrusion

involved in drug testing. *Skinner*, 489 U.S., at 626. Drug testing requiring excretion of the bodily fluids is far different than simply disclosing financial records. The requirement of an individual performing an excretory function is a much more private and personal process than the simple revelation of the money in one's bank account or ownership of certain investments. The Court has not recognized such financial disclosure requirements are on the same level as a drug testing procedure that require an individual to perform an excretory function. The point is argued that the candidate's privacy expectations are lowered by the background checks as the Court held in *Von Raab*, 489 U.S., at 671. However, the issue once again is the privacy interest of an individual being balanced against the state's interest in needing to perform such a private and personal search. The state's need is more than adequately served by current law enforcement and the scrutiny of a candidate given by the media. No special need of the state exists given the media's *0pen-hunting-season* approach to candidates involved in our elections. Normal law enforcement methods and this election process are sufficient to prevent drug users from attaining office. The people of the United States adopted the Fourth Amendment to prevent personal and private searches based on the mere possibilities of criminal activity or the facile arguments of demagogues and tyrants. No special need is shown in the present case that is not served by the election process, law enforcement with searches conditioned on probable cause and warrants, public association with the candidate, and media scrutiny.

A. The mere possibility that a candidate may be involved in a criminal activity adds no substantive weight the government interest relative to the weight of the individual's Fourth Amendment rights.

Criminals may be sometimes elected or candidates may become criminals after elected, but law enforcement and our election process are the true protectors of the public's trust. The Washington Legal Foundation's Amicus brief, p. 22, cites several instances of where politicians have been implicated in some form of drug dealings. These stories are evidence that law enforcement and the close examination of politicians by the public is sufficient to safeguard our government. Politicians have been caught and convicted of many different crimes just as many other people have. The fact that politicians exist who commit or have committed crimes does not give the government the right to abridge everyone's Fourth Amendment rights under the tests enunciated by the Court in *Von Raab*, 489 U.S. 652, *Skinner*, 489 U.S. 602, or *Acton*, 115 S.Ct. 2386, unless a compelling, special need is found that outweighs the people's Fourth Amendment right. The simple possibility of the occurrence of an event taking place is generally no basis for abridging the Fourth Amendment rights of a candidate unless there is the threat of great and/or immediate danger. Actual dangers or concerns are required to be shown, similar to those in *Skinner*, *Von Raab* and *Action*. The Fourth Amendment offers little protection to the individual from the government. if simply the possibility of a danger need be shown thereby allowing a warrantless suspicionless search.

B. The Respondents are incorrect in their argument that the privacy interest of a potential candidate is decreased substantially because they are seeking to be elected to public office.

The respondents cite several cases that indicate that malice is required to prove libel by a publication as to an untrue statement about a candidate. *See Monitor Patriot* Co. diseases, 401 U.S. 265, 271 (1970); *Ocalla Star-Banner Co. v. Damron*, 401 U.S. 298 (1970), *New York Times v. Sullivan*, 376 U.S. 254 (1964). These cases simply indicate malice is required before a newspaper can be held liable for publishing a libelous statement about an individual. In *New York Times v. Sullivan*, 376 U.S. 254, the Court is upholding the First Amendment right of free speech. The fact that the potential candidates entire life can be the focus of discussion, with the publisher of information having the heightened protection of *New York Times v. Sullivan*, 376 U.S. 254, requiring malice as to the publication of libelous information, does not lessen the right of the individual be free from an unreasonable search by the government. This heightened protection of a publisher under the First Amendment is one more reason why the mechanisms for determining whether a candidate is a law violator are sufficient without the need for the candidates Fourth Amendment rights being abridged.

The candidates subject to the test would not be, if elected, continuously and intimately involved with drug traffickers and probably not at all. They are not children in the custodial care of the state, where the state is in "loco parentis". *Acton*, 115 S.Ct., at 2391. The job of the legislature does not involve a situation where a

physical or mental error could result in great and life threatening immediate danger to people. The situation is not one where a great and immediate threat to life exist. *Skinner*, 489 U.S. 602

Respondents cite *Malcolm v. Webb*, 211 Ga. 449 (1955), Respondent's brief, p. 12, in support of their argument to show that the interest of the state in drug testing is an important, compelling interest. This respondents argue that because *Malcolm*, 211 Ga., at 456, holds that a public officer must use his or her best "judgment and skill", the state's interest is compelling. Respondent's brief, p. 12. The respondents appear to be attempting to make some analogy to the *Von Raab*, 489 U.S., at 672, requirement that agents should reasonably expect such inquiry into fitness and probity. Again, the analogy is inappropriate. The job of the drug agents directly involved continuous exposure to drugs. The job of drug agents are involved in the job of interacting with drugs and with persons involved with the trafficking of drugs on a large scale basis. The agents are involved with life-and-death situations and the success of the drug interdiction effort. Physical fitness is an important part of the job upon which lives may depend. These are the reasons justifying the Fourth Amendment intrusion. None of these factors are substantially present in the offices of Governor, Lieutenant Governor, Commissioner of Agriculture, or legislator. If these factors are present, they are subject to the checks and balances of the system and the democratic process of examination.

In arguing a person must use his best "judgment and skill" and, therefore, must be tested for drug abuse, opens the door to just about any other testing. Based upon this reasoning, candidates could be tested for alcoholism, genetic defects, ethics, intelligence, diseases, mental illness or any thing that society considered abnormal so that we may be sure that a person elected to office is not distracted due to some problem in his or her life and that these problems will not get in the way of his or her best "judgment and skill" in office. This argument is extreme, but the Respondent's argument is difficult to interpret otherwise.

4. Almost all elected politicians have the potential to do harm to the people in some way because of their elected position. But, because of all the safeguards of law enforcement with the ability to make warranted and suspicion based searches, the scrutiny given to candidates by the public and the media, and finally the protection of the Fourth Amendment, the weight of government's interest is much less than the weight of the individual's Fourth Amendment right.

The respondents argue that the danger lies in a possibility that an illegal drug user might involved with the arrests, convictions and enactment of legislation. The hypothetical involvement of the Governor, Lieutenant Governor, Commissioner of agriculture, and legislators with drugs does not involve continuous involvement of drugs as was present in *Von Raab*. Also, Politicians are always subject to the scrutiny of the public. While it is true that some elected officials must be involved with arrests, convictions and enactment of legislation, that fact is true as to all crimes and other important matters.

This involvement does not provide justification for the repeal the Fourth Amendment for all political candidates. According to the Respondent's argument, if a person is involved in anyway with activity dealing with crime, that person is therefore "susceptible to influence by those" who participate in such crimes. The reasoning appears to be: because these candidates might be involved with governmental action toward crime, the individual candidate is therefore susceptible to undue influence by those who commit crime, and, therefore, must sacrifice their Fourth Amendment rights. This reasoning opens the door for the justification of the political candidate, as well as anyone else in a position to do any damage to life or property, having his or her Fourth Amendment rights abridged.

The respondent argues that a state elected official, as a result of using drugs, will be subject to bribery and blackmail which will result in their assistance with the distribution and use of drugs. This is a concern as to any type of crime. What if a politician is or has been involved with organized crime, murder, adultery, robbery, embezzlement, smuggling, or any other crime? The elected official could be involved in enacting crime laws, enforcing laws and prosecuting those who violate the law. All politicians are then in positions to be corrupted. This potential involvement does not mandate that all elected officials should have their Fourth Amendment rights abridged.

The United States amicus brief in support of the Respondent complains that the Petitioners point out that the necessary interest of government to justify a

warrantless or suspicionless search must be compelling. The Court provides in *Acton*, 115 S.Ct. 2386, that "the most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government responsibilities, under a public school system, as guardian and tutor of the children entrusted to its care." *Acton* 115 S.Ct., at 2396. Also the Court found that, "indeed, we could not possibly find clearly erroneous – the district Court's conclusion that 'a large segment of the student body, particularly those in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached 'epidemic proportions,' ' and that 'the rebellion was fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture.' 796 F.Supp., at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, ..." Id., at 2395. The interest was immediate and compelling considering the concern was for children, who were wards of the state. Id. The concern raised here is not an immediate and compelling interest and does not involve children who are wards of the state. Further, the Court in *Acton*, 115 S.Ct. 2386, 2394-2396, did not in anyway overrule the holdings in *Von Raab*, 489 U.S., at 670, or *Skinner*, 489 U.S., at 628, where the Court did require a compelling interest to be shown.

CONCLUSION

The Court should hold unconstitutional O.C.G.A. § 21-2- 140reversing the Eleventh Circuit Court of Appeals.

WALKER I. CHANDLER
ROBERT E. TURNER
Counsel of Record
120 West Jackson Street
Post Office Box 7
Zebulon, Georgia 30295
(770) 567-3882
Attorneys for Petitioners

Supreme Court, U.S.
FILED
DEC 10 1996

No. 96-126

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, ET AL., PETITIONERS

v.

HONORABLE ZELL D. MILLER, GOVERNOR OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
LEONARD SCHAITMAN
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether Section 21-2-140(b) of the Georgia Annotated Code (Michie 1993), which provides that "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs," violates petitioners' Fourth Amendment rights.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. Compelled urinalysis drug testing for purposes other than law enforcement is reasonable under the Fourth Amendment if the government's important interests outweigh the individual's privacy expectations	9
II. States do not offend the Fourth Amendment by requiring candidates for certain top state offices to certify that they have tested negative for drugs as a condition of qualifying for the ballot	17
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Acton v. *Vernonia School Dist. 47J*, 23 F.3d 1514 (9th Cir. 1994), rev'd, 115 S. Ct. 2386 (1995)	12
Bluestein v. *Skinner*, 908 F.2d 451 (9th Cir. 1990), cert. denied, 498 U.S. 1083 (1991)	2
Brockington v. *Rhodes*, 396 U.S. 41 (1969)	9
Burdeau v. *McDowell*, 256 U.S. 465 (1921)	11
Burdick v. *Takushi*, 504 U.S. 428 (1992)	17
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971)	11
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	23
Harmon v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990)	2, 13, 14
Hartness v. *Bush*, 919 F.2d 170 (D.C. Cir 1990), cert. denied, 501 U.S. 1251 (1991)	2, 14
International Bh'd of Teamsters v. *Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991)	1-2, 18

Cases—Continued: Page

NTEU v. *United States Customs Service*, 27 F.3d 623 (D.C. Cir. 1994) 1, 13, 14
NTEU v. *Von Raab*, 489 U.S. 656 (1989) ..... *passim*
NTEU v. *Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) 2
Norman v. *Reed*, 502 U.S. 279 (1992) 10
O'Connor v. *Ortega*, 480 U.S. 709 (1987) 23
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 1, 2, 5, 10, 11, 13, 14, 15, 20
Storer v. *Brown*, 415 U.S. 724 (1974) 10
United States v. *O'Brien*, 391 U.S. 367 (1968) 6
Vernonia School Dist. 47J v. *Acton*, 115 S. Ct. 2386 (1995) ..... *passim*
Walter v. *United States*, 447 U.S. 649 (1980) 11
Willner v. *Thornburgh*, 928 F.2d 1185 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991) . 2, 13, 17, 20, 21, 23-24

Constitutions and statutes:

U.S. Const.:
Amend. I 3, 6, 7, 9, 17, 18
Amend. IV ..... *passim*
Amend. V 3
Amend. IX 3
Amend. XIII 3
Amend. XIV (Equal Protection Clause) 3, 6
Ga. Const.:
Art. III, § 2, ¶ 5 4
Art. V:
§ 1, ¶ 3 4
§ 1, ¶ 5 18
§ 2, ¶ 1 19
§ 2, ¶ 10 19
§ 3, ¶ 1 4
Voting Rights Act of 1965, 42 U.S.C. 1973c 2
Ga. Code Ann. (Michie 1993):
§ 2-2-7 19
§ 2-2-11 ..... 19, 20
§ 2-2-11(4) 20
§ 21-2-140 2

Statutes—Continued: Page

§ 21-2-140(a)(2) 2, 3
§ 21-2-140(a)(3) 2-3
§ 21-2-140(a)(4) 3
§ 21-2-140(b) 2, 9
§ 21-2-140(c) 3
§ 21-5-30 22
§ 21-5-50 22
§ 35-2-1 19
§ 35-2-30 19
§ 35-2-32 19
§ 35-3-2 19
§ 35-3-9 19
§ 38-2-10(a)(1) 19
§ 38-2-11(b) 19
§ 38-2-110 19
§ 45-5A-2 18
§ 45-12-7 18
§ 45-12-27 19
§ 45-12-28 19
§ 45-12-31 19

Miscellaneous:

David Lockard, *Protecting Medical Laborties from Tort Liability For Drug Testing*, 17 J. Legal Med. 427 (1996) 24
Special Section: Election '94 Georgia Races, Atl. Journ.-Const., Nov. 10, 1994 4

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-126

WALKER L. CHANDLER, ET AL., PETITIONERS

v.

HONORABLE ZELL D. MILLER, GOVERNOR OF GEORGIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Although there is no federal statute or law requiring that candidates for any elective office submit to urinalysis drug testing, the federal government does require drug testing in a variety of contexts.[1] The

---

[1] See, *e.g.*, *NTEU* v. *Von Raab*, 489 U.S. 656 (1989) (drug testing of applicants for promotion to certain positions at Customs Service); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of certain railroad employees based on reasonable suspicion or occurrence of incident); *NTEU* v. *United States Customs Service*, 27 F.3d 623 (D.C. Cir. 1994) (random drug testing of persons with access to sensitive computer databases relating to drug interdiction); *International Bh'd of Teamsters* v. *Department of Transporta-*

United States therefore has a substantial interest in questions concerning the application of Fourth Amendment standards to drug testing programs. The United States participated as amicus curiae in *Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386 (1995), and federal officials were parties to *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *NTEU* v. *Von Raab*, 489 U.S. 656 (1989).

STATEMENT

1. In 1990, Georgia amended its election laws by enacting Ga. Code Ann. § 21-2-140 (Michie 1993).[2] The statute provides that "[e]ach candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs." *Id.* § 21-2-140(b). Illegal drugs include marijuana, cocaine, opiates, or amphetamines, as well as phencyclidines except when used pursuant to a valid prescription or otherwise authorized by law. *Id.*

---

tion, 932 F.2d 1292, 1307 (9th Cir. 1991) (drug testing of new motor carrier employees); *Willner* v. *Thornburgh*, 928 F.2d 1185 (D.C. Cir.) (drug testing of individuals offered jobs at Department of Justice as condition of employment), cert. denied, 502 U.S. 1020 (1991); *Hartness* v. *Bush*, 919 F.2d 170 (D.C. Cir. 1990) (drug testing of persons with access to secret national security information), cert. denied, 501 U.S. 1251 (1991); *NTEU* v. *Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (drug testing of agency's motor vehicle operators); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (drug testing of air traffic controllers), cert. denied, 498 U.S. 1083 (1991); *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (drug testing of employees with "top secret" clearances), cert. denied, 493 U.S. 1056 (1990).

[2] The statute was precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, prior to its implementation.

§ 21-2-140(a)(3). The certificate must state that the candidate was tested within 30 days prior to qualifying for nomination or election to state office and that the results were negative. *Id.* § 21-2-140(c). Under the statute, the certification that the test was negative—which is the only information the statute makes available to the government—must be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources. *Ibid.* The drug test is to be conducted "in a manner equivalent to that required by [U.S. Department of Health and Human Services Guidelines] or other professionally valid procedures approved by the commissioner of human resources." *Id.* § 21-2-140(a)(2). The statute applies to candidates for certain enumerated state offices in all three branches of government, including elected judges. *Id.* § 21-2-140(a)(4).

2. Petitioners were Libertarian Party nominees in 1994 for the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the General Assembly. Pet. App. 2A. They brought this action in the United States District Court for the Northern District of Georgia in May 1994, claiming that the certification requirement violated their rights under the First, Fourth, Fifth, Ninth, Thirteenth, and Fourteenth Amendments, and also under the Georgia Constitution. They sought declaratory and injunctive relief barring enforcement of the statute.

Although the complaint alleged that the three petitioners were duly nominated candidates of the Libertarian Party for the general election in November 1994, Compl. ¶¶ 3-5, the complaint made no class allegations and did not allege that the plaintiffs intended to run for office in any future election. The complaint did allege that the Libertarian Party had

run candidates in the past and was the third largest party in Georgia, Compl. ¶ 6, and that petitioner Chandler had run as a Libertarian party candidate for Lieutenant Governor in 1990. Compl. ¶ 9. It appears that none of petitioners have run for any office for which drug testing is required since 1994, although elections for the General Assembly were held this year. See Ga. Const. art. III, § 2, ¶ 5 (two-year terms for members of the General Assembly). The next elections for Lieutenant Governor and Commissioner of Agriculture will not be held until 1998. See *id.* art. V, § 1, ¶ 3 (four-year term for Lt. Governor); *id.* art. V, § 3, ¶ 1 (four-year term for Commissioner of Agriculture).

3. On June 21, 1994, the district court denied petitioners' motion for a preliminary injunction, holding that the importance of the offices for which they were running and the relative unintrusiveness of the testing procedures made it unlikely that petitioners would succeed on the merits of their Fourth Amendment claim. Pet. App. 5B. All three petitioners apparently took the drug tests and filed the required certification, since all appeared on the ballot and unsuccessfully stood for election in November 1994. See *Special Section: Election '94 Georgia Races*, Atl. Journ.-Const., Nov. 10, 1994 (including vote tallies for two of three petitioners). After the 1994 election, the parties made a joint motion for entry of final judgment on stipulated facts, which the district court granted.

4. A divided panel of the court of appeals affirmed the district court's decision. The majority held that the drug tests required by the statute were searches, Pet. App. 3A, but that they were designed for purposes other the ordinary needs of law enforce-

ment, *id.* at 4A. The majority accordingly applied the balancing test articulated by this Court in *Skinner* and *Von Raab*, weighing the State's interests against the privacy interests of the persons subject to testing. *Ibid.*

Although there was no specific record of abuse among those subject to testing, the majority noted that unlawful drug use was "fundamentally inconsistent with high state office." Pet. App. 6A. The court explained that, because Georgians "place in the trust of their elected officials * * * their liberty, their safety, their economic well-being, [and] ultimate responsibility for law enforcement," *ibid.*, "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use," *id.* at 7A. Moreover, the very nature of such high offices "demands the highest levels of honesty, clearsightedness, and clear thinking," which are inconsistent with drug use. *Ibid.* The majority outlined the statutory duties of the offices that petitioners sought, *id.* at 7A-8A, and concluded that those "positions are particularly susceptible to the 'risks of bribery and blackmail against which the Government is entitled to guard.'" *Id.* at 8A (quoting *Von Raab*, 489 U.S. at 674).

The majority viewed petitioners' privacy interests as less weighty than those in *Von Raab*, noting that the Georgia statute permitted petitioners to take the drug test at their own physician's office without auditory observation. Pet. App. 9A. As in *Von Raab*, the Georgia scheme requires the labs that perform drug tests under the statute to use HHS procedures, and the tests themselves reveal only whether illegal

drugs were used. *Id.* at 9A-10A. The court noted that if a candidate chooses not to file the results (and therefore not to run for office) after a positive test result, the positive result will never be made available to law enforcement offices; if the test is done at a private physician's office, no government agent will even know a test was conducted. *Id.* at 10A. Finally, the court noted that, as in *Von Raab*, petitioners' privacy interests were diminished: "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position." *Ibid.* The court concluded that, on balance, "[b]ecause the governmental interests of the state of Georgia outweigh the intrusions on privacy effected by the challenged testing," the statute, as applied to petitioners, did not violate the Fourth Amendment. *Ibid.*[3]

Judge Barkett dissented. Pet. App. 20A-35A. She argued that the majority had not justified its assertion that this case involved special needs beyond the

[3] The court also held that, because the statute simply disqualifies a non-suspect class (*i.e.*, illegal drug users) from holding political office, it "does not improperly infringe on the rights of people to run and of voters to choose the candidate of their choice" in violation of the Equal Protection Clause. Pet. App. 12A. The court similarly rejected petitioners' argument that the statute violates the First Amendment because petitioners' refusal to submit to the drug tests "is itself a protected free speech act." *Id.* at 13A. Relying on *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court held that the statute's regulation of conduct is valid because "it is generally within the power of the State of Georgia to prescribe qualifications for its elected officials," the statute furthers substantial governmental interests, the government's purpose is not to suppress free expression, and the regulation is no more restrictive of expression than necessary. Pet. App. 14A-15A.

normal need for law enforcement that would make obtaining a warrant impractical. *Id.* at 20A-22A. In her view, there was an insufficient nexus between the duties of the offices for which petitioners had run and the danger the State sought to avoid. *Id.* at 23A-27A. Judge Barkett also argued that the majority had not properly balanced the interests involved. She noted that, unlike the employees in *Von Raab*, petitioners seek to participate in public office, a right that the Constitution protects. *Id.* at 27A-28A. Judge Barkett also disagreed with the majority's First Amendment holding, contending that the statute "effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry." *Id.* at 29A.

SUMMARY OF ARGUMENT

Fourth Amendment principles for evaluating drug-testing programs based on special needs beyond the normal need for law enforcement are by now well established. The existence of a Fourth Amendment violation turns on a balancing test, in which the governmental interest in conducting drug testing under the particular program being challenged is weighed against the intrusion on individuals' legitimate expectations of privacy that would be caused by the challenged program.

This Court should reject the invitation of amici American Civil Liberties Union, et al., to revisit those settled principles. For example, amici propose a categorical approach under which drug testing violates the Fourth Amendment unless there is a "truly compelling" government interest aimed at "specific

and immediate threats" and the privacy rights of the person to be tested are "minimal." ACLU Br. 11, 8, 5. As the Court recently reaffirmed in *Vernonia*, however, there is no "fixed, minimum quantum of governmental concern" required by the Fourth Amendment. 115 S. Ct. at 2394. The relevant question under the Fourth Amendment is instead whether the governmental interest "appears *important enough* to justify the particular search" in light of the degree of intrusion on a genuine expectation of privacy that the drug testing program entails. *Id.* at 2394-2395. Depending on the opposing interests on each side of the balance, that standard can be satisfied in cases in which the threat is not "specific and immediate" and in cases in which the privacy rights affected by the program are not "minimal."

If the correct balancing approach is applied, the Fourth Amendment does not bar States from requiring candidates for certain top state elective offices to certify they have passed a drug test in order to qualify for the ballot. For example, a drug testing program may be supported by a State's interest in seeing to it that drug users not serve in high government positions with significant responsibility for law enforcement in general and for enforcement of the drug laws in particular. Because the Lieutenant Governor of Georgia must be able to take on such responsibilities when the Governor suffers a temporary disability or when the Governor's office becomes vacant, that interest is implicated in this case.

On the privacy side, candidates have limited expectations of privacy, given the intrusions on personal privacy that necessarily accompany campaigning for high office and the statutory requirements of

campaign disclosure. The Georgia drug testing procedures are based upon the Health and Human Services Guidelines, which this Court has held significantly minimize the intrusiveness of drug testing. Candidates know in advance that they will have to be tested, and they have some control over the timing of the test, which can be taken at their private physician's office. The remaining privacy interests are insufficient to outweigh the State's interests in conducting drug testing.

Because the United States does not require drug testing of candidates for any federal office, we express no views on the First Amendment questions presented by this case.

ARGUMENT

I. COMPELLED URINALYSIS DRUG TESTING FOR PURPOSES OTHER THAN LAW ENFORCEMENT IS REASONABLE UNDER THE FOURTH AMENDMENT IF THE GOVERNMENT'S IMPORTANT INTERESTS OUTWEIGH THE INDIVIDUAL'S PRIVACY EXPECTATIONS

A. Petitioners argue that the application in this case of Georgia's statutory requirement that a candidate seeking to qualify for nomination or election to high state office certify that he or she "has tested negative for illegal drugs," Ga. Code Ann. § 21-2-140(b) (Michie 1993), violates the Fourth Amendment.[4]

---

[4] There is a substantial question whether any continuing controversy exists. Indeed, this case may have become moot while it was still in the district court. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969). Petitioners appeared on the ballot (and were defeated) in the 1994 election, apparently by submitting to the contested drug-testing procedures. Thus,

It is not disputed that the certification requirement involves the sort of "state-compelled collection and testing of urine" that "constitutes a 'search' subject to the demands of the Fourth Amendment." *Vernonia*, 115 S. Ct. at 2390; see also *Skinner*, 489 U.S. at 617; *Von Raab*, 489 U.S. at 665. Nor is it disputed that there was sufficient state action to implicate the Fourth Amendment, since the drug tests, though they may be conducted by the candidate's private physician and a private laboratory,

---

there remains no further controversy regarding that election. The Court has recognized that some challenges to election laws are capable of repetition yet evading review. *E.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Norman* v. *Reed*, 502 U.S. 279, 287-288 (1992). This case, however, does not appear to fall within that category. The only plaintiffs in the case were the three petitioners; the Libertarian Party itself was not a party to the case. As to the three petitioners, the record indicates that petitioner Chandler ran for Lieutenant Governor in 1990 and 1994. Yet neither he nor either of the other petitioners have alleged that they intend to run for a covered state office in 1998, and neither court below made any finding on that question. Nor is it clear that this case qualifies as a dispute that would evade review if it arose again. If petitioners run for covered state offices again in the future, they may be able to obtain an adjudication on the merits of their challenge to the drug testing scheme if they act more promptly than they did here. In this case, for example, petitioners made no effort to obtain appellate review before the deadline for qualifying for the 1994 ballot or before the 1994 election itself. They did not appeal the denial of their request for a preliminary injunction, and they did not seek emergency relief from the court of appeals or this Court. Instead, they apparently decided to comply with the law in order to qualify for the 1994 election, after which they agreed to entry of judgment and appealed. Had they sought more prompt appellate review, they may have been able to obtain appellate review of their claim while there was still a live controversy.

are undertaken only because they are mandated by statute as a condition for qualifying for the ballot. *Skinner*, 489 U.S. at 614. See, *e.g.*, *Walter* v. *United States*, 447 U.S. 649 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).

The Fourth Amendment does not require a warrant or individualized suspicion when a drug-testing program is based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619-620. The validity of such a program depends upon a balancing of "its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 115 S. Ct. at 2390; *Skinner*, 489 U.S. at 619. In any particular program, the question is not how strong the governmental interest is in isolation but instead whether that interest "appears *important enough* to justify the particular search" in light of the degree of intrusion on a genuine expectation of privacy that the program involves. *Vernonia*, 115 S. Ct. at 2394-2395. The government is not required to use "less drastic alternatives" if suspicionless drug testing is otherwise reasonable in the circumstances. See *Skinner*, 489 U.S. at 629 n.9.

B. Both petitioners (Pet. Br. 6-21) and amici American Civil Liberties Union, et al. (ACLU Br. 6-18) advocate limitations on suspicionless drug testing that are inconsistent with this Court's precedents.

1. Petitioners and the ACLU contend that suspicionless drug testing necessarily violates the Fourth Amendment unless the governmental interest is "compelling." Pet. Br. 10; ACLU Br. 6. Indeed, the

ACLU appears to reject a balancing test entirely.[5] It argues that the governmental interest in suspicionless drug testing must be "truly compelling" (ACLU Br. 11) and that the drug testing must be "aimed at *specific and immediate threats*." ACLU Br. 8 (emphasis added); see also Pet. Br. 7, 10. By "specific and immediate threats," the ACLU means "dangers" with the "immediacy" of "a speeding train, a nuclear power plant, a firearm." ACLU Br. 9.

The "compelling interest" and "specific and immediate threat" standards embody essentially the test articulated by the Ninth Circuit in *Acton* v. *Vernonia School Dist. 47J*, 23 F.3d 1514, 1526 (1994) ("it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless drug testing"); see also *ibid.* ("extreme dangers and hazards"); *id.* at 1524 ("truly serious concerns of a safety nature"); *id.* at 1524-1525 ("cases fraught with danger").[6] This Court, however, has rejected those standards.

---

[5] Indicative of the distance between the ACLU's position and the Court's precedent is the ACLU's failure to mention the word "balancing" anywhere in its brief. Rather, the ACLU argues (ACLU Br. 4-5) that the Fourth Amendment contains a "strong presumption against suspicionless searches" which cannot be overcome unless the drug testing serves "compelling special needs" *and* unless the "privacy interests implicated * * * are minimal."

[6] Indeed, the ACLU's list of specific and immediate threats ("a speeding train, a nuclear power plant, a firearm") is almost exactly the same list that the Ninth Circuit believed was necessary to support drug testing. *Acton*, 23 F.3d at 1526 ("airplane or train wreck, or a gas pipeline or nuclear power plant disaster"). The ACLU adds "even a helmeted football player" to this list (ACLU Br. 9) in recognition of this Court's holding in *Vernonia*.

First, in *Vernonia*, the Court rejected the "compelling interest" standard, holding that there was no "fixed, minimum quantum of governmental concern" required by the Fourth Amendment. 115 S. Ct. at 2394. *Skinner* and *Von Raab* require application of a balancing test. Therefore, in order to justify a drug testing program, the governmental interest need not be "compelling"; it must simply "appear[] *important enough* to justify the particular search." *Id.* at 2394-2395.

Among the governmental interests this Court and the courts of appeals have deemed sufficiently important to justify a drug testing program are the interests in protecting health and safety, *Von Raab*, 489 U.S. at 668-671; *Skinner*, 489 U.S. at 628-629; safeguarding sensitive information—including but not limited to national security information, *Von Raab*, 489 U.S. at 677-678;[7] ensuring the integrity of the drug-interdiction and drug-abuse prevention process, *id.* at 668-670; see *Harmon*, 878 F.2d at 490-491; helping to deter drug use by students who participate in interscholastic athletics, *Vernonia*, 115 S. Ct. at 2395; and screening out drug users from government employment, *Willner*, 928 F.2d at 1192-1193 (noting the "considerable investment in terms of time and money whenever [the government] hires someone" and statistical evidence showing "an extremely high correlation between a positive result in a pre-

---

[7] See also *NTEU* v. *United States Customs Service*, 27 F.3d at 627-628 (access to computer databases containing sensitive information regarding drug interdiction); *Harmon* v. *Thornburgh*, 878 F.2d at 491-492 (access to top secret information).

employment drug test and subsequent employment problems").

Second, the Court in *Von Raab* made clear that the threat—the danger feared by the government—did not have to be "immediate" in the sense the ACLU uses that term, that is, a threat of imminent catastrophic harm caused directly by a single error committed by a drug-impaired employee. In *Von Raab*, the Court held that the Customs Service could require drug testing for employees who handle "truly sensitive information." 489 U.S. at 677. See also *Harmon*, 878 F.2d at 491-492 (top secret information); *Hartness* v. *Bush*, *supra* (secret information); *NTEU* v. *United States Customs Service*, 27 F.3d at 628 (sensitive but unclassified information of use to drug smugglers). The potential harm that employees with access to classified or other sensitive information can cause by disclosing the information is extremely serious, but the harm typically takes longer to occur and depends on the operation of a longer causal chain than the ACLU wishes to permit. For instance, a drug-using employee with top-secret clearance could become strapped for cash and subject to bribery or blackmail. The employee could turn classified information over to others, and the harm from the disclosure may take months or years to occur. While that harm is not "immediate" in the sense contemplated by the ACLU, it is nevertheless sufficient, under *Von Raab*, to support suspicionless drug testing.

Finally, petitioners (Pet. Br. 9) and the ACLU (ACLU Br. 8) argue that there must be a showing that drug testing was instituted in response to a history of drug use, but *Vernonia* confirmed that no such showing is necessary. The Court noted that the

disciplinary problems in the Vernonia schools were "of greater proportions" than in *Skinner*, where the drug testing was upheld "without proof that a problem existed on the particular railroads whose employees were subject to the test," and "of much greater proportions" than in *Von Raab*, "where there was no documented history of drug use by any customs officials." *Vernonia*, 115 S. Ct. at 2395. By reaffirming in *Vernonia* that there was "no documented history of drug use" in *Von Raab*, the Court foreclosed the ACLU's argument here (ACLU Br. 8) that suspicionless drug testing cannot be upheld in the absence of "any record evidence * * * of a drug problem among the offices covered" by the statute. See *Von Raab*, 489 U.S. at 474-475; compare *id.* at 683-684 (Scalia, J., dissenting).

2. On the privacy side of the balance, petitioners argue that the drug testing to which they were required to submit was highly intrusive (Pet. Br. 16-19), and the ACLU goes further by arguing (ACLU Br. 5) that drug testing can never be required unless the privacy interests at stake are "minimal." That is not the correct standard. As with the governmental interest, there is no "fixed, [max]imum quantum" of intrusion on privacy that will be tolerated, *Vernonia*, 115 S. Ct. at 2394; a balancing test applies under *Skinner* and *Von Raab*, and even a significant intrusion upon privacy may be reasonable if the governmental interest is strong enough.

The privacy concerns ordinarily implicated by urinalysis drug testing are "negligible," *Vernonia*, 115 S. Ct. at 2393, when the procedures used in collecting and analyzing the urine samples are set up "to reduce the intrusiveness" of the process. *Skinner*, 489 U.S. at 626; see *Von Raab*, 489 U.S. at 672. The

privacy concerns are also minimized when the tests "look only for drugs," not for medication, and when "the results of the tests are disclosed only to a limited class of [officials] who have a need to know; and * * * are not turned over to law enforcement." *Vernonia*, 115 S. Ct. at 2393.

The ACLU contends (ACLU Br. 13-14) that the testing of urine in itself is an unacceptable invasion of privacy, and it objects to the collection procedures outlined in the Health and Human Services Guidelines. This Court has previously dealt with those very concerns. The Court has recognized that urinalysis drug testing implicates privacy concerns, *Skinner*, 489 U.S. at 617, but it nevertheless has upheld such testing in all three cases in which it was challenged. The fact that drug testing involves a search of urine is not a factor unique to the Georgia program; urinalysis, by definition, involves a search of urine. Similarly, the collection procedures under the HHS Guidelines, which the ACLU criticizes as "not appreciably lessen[ing] the nature of this intrusion" (ACLU Br. 14), were praised by this Court as "significantly minimiz[ing] the intrusiveness of the * * * drug-screening program." *Von Raab*, 489 U.S. at 673 n.2. The federal government uses the HHS Guidelines in all of its drug testing programs, and those Guidelines set the standard for protecting the privacy of employees undergoing drug testing.

II. STATES DO NOT OFFEND THE FOURTH AMENDMENT BY REQUIRING CANDIDATES FOR CERTAIN TOP STATE OFFICES TO CERTIFY THEY HAVE TESTED NEGATIVE FOR DRUGS AS A CONDITION OF QUALIFYING FOR THE BALLOT

Georgia requires anyone wishing to qualify as a candidate for high state office to submit a certification that within the past 30 days the candidate has passed a drug test. While the statutory list of the covered offices is extensive, this case concerns only three specific state offices—Lieutenant Governor, Commissioner of Agriculture, and member of the General Assembly. We will leave it to respondents to articulate the State's rationale for testing candidates for these three offices, but, in our view, some general considerations applicable to high state officials are legitimate factors upon which the State can rely on its side of the balancing test under the Fourth Amendment.[8]

---

[8] This case also involves the scope of the States' authority to set qualifications for state office and regulate access to the ballot and the scope of the associational rights of candidates to run for elective office. Those issues have little to do with the privacy interests protected by the Fourth Amendment. Contrary to the dissenting judge below, see Pet. App. 27A-28A, we therefore believe that the presence of those issues has little impact on the Fourth Amendment analysis. Instead, those issues implicate interests protected by the First Amendment. See, *e.g.*, *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) (in adjudicating challenges to state restrictions on ballot access, "the rigorousness of our inquiry * * * depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights"). As we noted above, because the United States does not require drug testing of candidates

A. States have an important interest supporting suspicionless drug testing of candidates for high state office. Like other governmental employers, States have an interest in "prevent[ing] the promotion of drug users to sensitive positions." *Von Raab*, 489 U.S. at 674. See also *Willner*, 928 F.2d at 1192 (drug testing of prospective federal employees); *International Bhd. of Teamsters*, 932 F.2d at 1307 (drug testing of prospective truck drivers). That interest is particularly strong when the sensitive position is a high political office whose holder has responsibility for law enforcement and for enforcement of the State's drug laws. Moreover, the State's interest in preventing the importation and distribution of illegal drugs "could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Von Raab*, 489 U.S. at 670. A drug user's indifference to the mission of fighting drugs, "or, even worse, his active complicity with the malefactors," *ibid.*, can prevent the apprehension of those responsible for distributing drugs.

States vary on where they place principal law enforcement and drug enforcement responsibilities, but ordinarily the Governor and Lieutenant Governor have some supervisory and some direct responsibility. That appears to be the case in Georgia. The Lieutenant Governor by law takes on the responsibilities of the Governor when the Governor suffers a temporary disability, and succeeds to the office of Governor when that office becomes vacant. Ga. Const. art. V, § 1, ¶ 5; Ga. Code Ann. §§ 45-5A-2, 45-12-7 (Michie 1993). The

---

for any federal office, we express no view on the First Amendment questions presented by this case.

Constitution vests in the Governor "[t]he chief executive powers" of the State," Ga. Const. art. V, § 2, ¶ 1, including the state constitutional right to "require information in writing from * * * all * * * officers and employees of the executive branch on any subject relating to the duties of their respective offices or employment," *id.* art. V, § 2, ¶ 10. The Governor's performance of his duties may have a vast impact on the state government and on the people of the State. Moreover, within the executive branch of state government are the Georgia State Patrol, see Ga. Code Ann. § 35-2-30 (Michie 1993), and the Georgia Bureau of Investigation, see *id.* § 35-3-2, both of which have substantial responsibility for law enforcement, including enforcement of drug laws.[9] See also *id.* § 35-2-1 (creating Board of Public Safety with policy-making authority). In addition, the Governor is the commander-in-chief of the state militia, *id.* § 38-2-110.[10] As commander-in-chief of the militia, the Governor may direct the Georgia National Guard to "assist and support federal, state, and local law enforcement

---

[9] The Georgia State Police have general jurisdiction "to patrol the public roads and highways," and to "prevent, detect, and investigate violations of the criminal laws of this state, any other state, or the United States which are committed upon these roads and highways or upon property appertaining thereto." Ga. Code Ann. § 35-2-32 (Michie 1993). The Georgia Bureau of Investigation is an investigative agency that employs, *inter alia*, "narcotics agents" with responsibility to "detect and apprehend violators of the criminal statutes of [Georgia] pertaining to the possession, sale or use of narcotics or other dangerous drugs." *Id.* § 35-3-9.

[10] The Governor has the authority to call out the militia to execute state laws, Ga. Code Ann. § 45-12-27 (Michie 1993), to put down insurrection, *id.* § 45-12-28, and to prevent violence and disorder, *id.* § 45-12-31.

agencies in drug interdiction, counterdrug activities, and drug demand reduction." *Id.* § 38-2-10(a)(1). He may also authorize the use of the Georgia National Guard outside the state if requested by another governor as part of a federally approved counterdrug law enforcement plan. *Id.* § 38-2-11(b).[11]

B. The privacy interests implicated by Georgia's scheme are not significantly different from those in *Skinner*, *Von Raab*, or *Vernonia*, and in certain respects they are less weighty. Under Georgia law, the drug testing is conducted "in a manner equivalent to that required by [U.S. Department of Health and Human Services Guidelines] or other professionally valid procedures approved by the commissioner of human resources." Ga. Code Ann. § 21-2-140(a)(2) (Michie 1993). The HHS Guidelines are the same rules that governed the procedures used in *Skinner* and *Von Raab*, and they "significantly minimize the

[11] In Georgia, the Commissioner of Agriculture has primarily regulatory responsibilities, Ga. Code Ann. § 2-2-7 (Michie 1993), but the Commissioner is also given the authority to conduct administrative inspections pursuant to a judicial warrant. *Id.* § 2-2-11. Ordinarily, inspections are to be conducted in the presence of the owner or occupant of the place to be searched without forcible entry, but the judicial officer issuing the warrant "may expressly authorize a forcible entry" based on a showing of a violation of a law administered by the Commissioner posing an immediate threat to health or safety or a showing that reasonable attempts to serve a previous warrant were unsuccessful. *Id.* § 2-2-11(4). The responsibilities of a member of the state's House of Representatives include passing legislation relating to crime and law enforcement. To that end, a member of the legislature may well serve on committees or otherwise engage in legislative investigation and oversight with respect to the State's law enforcement activities, including its efforts to combat drug trafficking.

intrusiveness" of the drug-screening program. *Von Raab*, 489 U.S. at 673 n.2. Requiring the production of a urine sample under these procedures "simulates what is a common medical procedure, an accepted part of a typical physical examination." *Willner*, 928 F.2d at 1189.

The intrusiveness of the process is further minimized by the prospective candidate's advance knowledge of the testing requirement and his or her ability, within limits, to select a time to undergo the testing at the office of a personal physician. In *Von Raab*, the Court found it a significant limit on the program's intrusion on privacy that "applicants know at the outset that a drug test is a requirement" of the positions to which they are applying, and that they are "notified in advance of the scheduled sample collection, thus reducing to a minimum any 'unsettling show of authority' that may be associated with unexpected intrusions on privacy." 489 U.S. at 672 n.2 (citation omitted); see also *Willner*, 928 F.2d at 1189-1190 (testing of federal job applicants who have received a tentative offer of employment).

The ACLU nevertheless contends (ACLU Br. 17) that the advance notice given to a candidate does not indicate "a lower expectation of privacy." But as *Von Raab* demonstrates, that is not the law. Although the ACLU is correct (ACLU Br. 17) that the government ordinarily "cannot avoid the dictates of the Fourth Amendment simply by giving notice of an impending intrusion," no one has suggested that advance notice is all that is required. Rather, advance notice is simply one factor that tends to diminish the individual's privacy expectations.

For their part, petitioners argue (Pet. Br. 19) that the drug testing program is likely to be "ineffective"

because a candidate who used drugs could avoid detection simply by abstaining from drug use long enough to produce a negative drug test on the date chosen by the candidate (but within 30 days of the election) for the drug test. But as the Court explained in *Von Raab*, that objection is to a feature of the program that "contribute[s] significantly to diminish the program's intrusion on privacy" and "under petitioners' view, 'the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy.'" 489 U.S. at 676 n.4 (citation omitted). Moreover, since a person's "pattern of elimination for a given drug cannot be predicted with perfect accuracy," "the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those * * * who venture to attempt them." *Id.* at 676. Petitioners themselves concede (Pet. Br. 19) that some drugs stay in the blood stream for up to 22 days and that Georgia's drug testing "may detect drugs in the worst of addicts of the more addictive drugs (e.g. heroin) who can not stop using the drug for even a short time." Thus, the court of appeals in this case correctly noted that "[p]ersons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office." Pet. App. 18A-19A n.4.

Other factors also limit the candidates' privacy expectations. Individuals who choose to participate in a campaign for high office often "voluntarily subject themselves to a degree of regulation" higher than that applicable to the general public. *Vernonia*, 115 S. Ct. at 2393. "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.

He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). In particular, Georgia law requires disclosure of campaign contributions, Ga. Code Ann. § 21-5-30 (Michie 1993), and also has extensive financial disclosure requirements, *id.* § 21-5-50, which candidates must comply with 15 days after qualifying for the ballot. The ACLU dismisses those limitations on privacy expectations by arguing (ACLU Br. 16) that financial disclosure is less intrusive than the drug testing itself, which is a "[v]iolation[] of bodily integrity." The significance of the disclosure requirements, however, is that they diminish privacy expectations, not that they involve the same type of intrusion as a drug test. The Court has already held that non-bodily intrusions—such as FBI background investigations—may "diminish [individuals'] expectations of privacy in respect of a urinalysis test." *Von Raab*, 489 U.S. at 677.[12]

---

[12] The ACLU argues (ACLU Br. 16 n.11) that "a decrease in privacy expectations may not be justified by the prevalence of applicant testing among large private employers," because "the Fourth Amendment's constraints do not apply to the private sector." It is of course indisputable that the Fourth Amendment does not limit private conduct. Nonetheless, the fact that drug testing of persons seeking employment is a common practice in the private sector is an indication that society does not consider such testing to be an unreasonable invasion of privacy. *Willner*, 928 F.2d at 1191-1192 (citing *O'Connor* v. *Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J., concurring in the judgment)). Given that the size of private-sector employment in this country vastly exceeds that of public-sector employment, the privacy expectations of a prospective employee (whether private or public) may well be affected by "the prevalence of applicant testing among large private employers." See, *e.g.*, *Willner* v. *Thornburgh*, 928 F.2d

CONCLUSION

To the extent the case is moot, it should be dismissed. Otherwise, if the Court reaches the merits of the Fourth Amendment issue, it should hold that States do not offend the Fourth Amendment by requiring candidates for certain top state office to certify they have tested negative for drugs as a condition of qualifying for the ballot.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
LEONARD SCHAITMAN
EDWARD HIMMELFARB
Attorneys

DECEMBER 1996

---

at 1185; David Lockard, *Protecting Medical Laboratories from Tort Liability for Drug Testing*, 17 J. Legal Med. 427, 427 (1996).

(5)

Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

No. 96-126

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, SHARON T. HARRIS, JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, GOVERNOR; LEWIS A. MASSEY, SECRETARY OF STATE OF GEORGIA; JAMES G. LEDBETTER, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES, STATE OF GEORGIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

STEVEN R. SHAPIRO
ACLU FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

GERALD R. WEBER
ACLU OF GEORGIA
142 Mitchell Street, S.W.
Atlanta, GA 30303
(404) 523-6201

STEPHEN H. SACHS
Counsel of Record
STEPHEN M. CUTLER
EDWARD P. SULLIVAN
WILMER, CUTLER, & PICKERING
2445 M. Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

November 12, 1996

(Attorneys Continued on Inside Cover)

25 pp

ARTHUR B. SPITZER
ACLU OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
C/O UNIVERSITY OF NEW MEXICO SCHOOL OF LAW
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

QUESTION PRESENTED

Have respondents shown, in accordance with the Fourth Amendment presumption against suspicionless searches, special needs sufficiently compelling to justify the substantial invasion of privacy caused by mandatory suspicionless drug testing of candidates for elected office?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

GEORGIA CODE ANN. § 21-2-140 VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 5

I. Respondents Have Failed to Show Sufficiently Compelling Special Needs to Justify the Suspicionless Drug Testing of Candidates for Elected Office in Georgia 6

II. The Suspicionless Drug Testing Program Here at Issue Is a Substantial Invasion Upon Petitioners' Privacy Interests 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Bond v. Floyd, 385 U.S. 116 (1966) 12

Chimel v. California, 395 U.S. 752 (1969) 6

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990) 10

Katz v. United States, 389 U.S. 347 (1967) 13

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) ..... *passim*

National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) 13

Olmstead v. United States, supra, 277 U.S. 438, *overruled, Katz v. United States*, 389 U.S. 347 (1967) .. 17

Reynolds v. Sims, 377 U.S. 533, 555 (1964) 18

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) ..... *passim*

Schmerber v. State of California, 384 U.S. 757 (1966) 16

Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) 13

United States v. Jacobsen, 466 U.S. 109 (1984) 17

Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) ..... *passim*

Whren v. United States of America, 116 S.Ct.1769 (1996) 1

Winston v. Lee, 470 U.S. 753 (1985) 13,16

CONSTITUTIONS AND STATUTES

U.S. Const. amend. IV ..... *passim*

Georgia Const. Art. 4, § 1, ¶ I 9,10

Georgia Code Ann. § 2-2-7 10

Georgia Code Ann. § 10-5-10 9,10

Georgia Code Ann. §14-5-20 9,10

Georgia Code Ann. § 21-2-132 14

Georgia Code Ann. § 21-2-140 ..... *passim*

Georgia Code Ann. § 21-5-50 16

Georgia Code Ann. § 33-2-1 9,10

TABLE OF AUTHORITIES—Continued

Page

Georgia Code Ann. § 34-2-3 10
Georgia Code Ann. § 45-13-20 9,10

RULES & REGULATIONS

53 Fed. Reg. 11979 (1988) 4,14

BOOKS, TREATISES & ARTICLES

Charles Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968) 14
Edith M. Shine, *Crimes and Offenses*, 9 Ga. St. U. L. Rev. 212, 218 (1992) 12
Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 487-517 (1995) 6

No. 96-126

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, SHARON T. HARRIS, JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, GOVERNOR; LEWIS A. MASSEY, SECRETARY OF STATE OF GEORGIA; JAMES G. LEDBETTER, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES, STATE OF GEORGIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and privacy embodied in the Constitution. The ACLU of Georgia is one of its local affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court as direct counsel and *amicus curiae*. *See, e.g., Whren v. United States of America*, 116 S. Ct. 1769 (1996); *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Because this case addresses an important Fourth

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. As part of its mission, NACDL strives to defend individual liberties guaranteed by the Bill of Rights. Due to the important Fourth Amendment issue at stake, NACDL has a substantial interest in the final outcome of this case.

STATEMENT OF THE CASE

In 1990, the Georgia legislature enacted Georgia Code Ann. § 21-2-140, requiring candidates for certain elected offices to submit to and pass a drug test in order to qualify for nomination or election.[2] The covered offices are: the Governor, Lieutenant

---

[2] Section 21-2-140 provides in full:

(a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed. Reg. 11979, *et seq.*, as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine; opiates; amphetamines; or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate with the officer with whom such candidate qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates; provided, however, that upon submission of a valid pauper's affidavit and valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00. No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with a political party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State at such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section.

Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme

Court, Judges of the Court of Appeals, Judges of the Superior Courts, District Attorneys, members of the General Assembly, and members of the Public Service Commission. Georgia Code Ann. § 21-2-140(a)(4).

At the time a candidate qualifies for nomination or election, the candidate must submit a certificate from an HHS-certified laboratory stating that the candidate has submitted to a drug test within the prior 30 days and has tested negative for marijuana, cocaine, opiates, amphetamines, and phencyclidines—except when any of those substances has been used pursuant to a valid prescription. The candidate may produce the urine specimen at the laboratory or at a physician's office. In either case, however, the specimen must be produced in accordance with the detailed procedures for supervising and monitoring the collection of specimens set forth in § 2.2(f) of the Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (1988) (hereinafter the "HHS Guidelines"). *See* Georgia Code Ann. §§ 21-2-140(a)(3), 21-2-140(c); (D. Ct. Consent Order and Final Judgment, Jan. 31, 1995, ¶ 4.) Those procedures are set forth in detail *infra* at pages 14-15.

Petitioners, candidates for Lieutenant Governor, Commissioner of Agriculture and General Assembly of Georgia, filed this action in the United States District Court for the Northern District of Georgia in May 1994. Petitioners sought a declaration that section 21-2-140 is unconstitutional, alleging, *inter alia*, that it violated the Fourth Amendment's prohibition against unreasonable searches and seizures. After the parties stipulated to the facts, the district court found that respondents' interests outweighed the privacy rights of petitioners, and ruled in favor of the respondents. A divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed. (The Eleventh Circuit's decision is published at 73 F.3d 1543 (11th Cir. 1996).) This Court granted a petition for writ of certiorari. 65 U.S.L.W. 3086 (Oct. 1, 1996).

SUMMARY OF ARGUMENT

In order to overcome the Fourth Amendment's strong presumption against suspicionless searches, respondents must show that the testing of candidates for elected office required under section 21-2-140 of the Georgia Code serves compelling special needs and that the privacy interests implicated by section

21-2-140 are minimal. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989); *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2394-95 (1995). Respondents have failed to carry this burden.

This Court has repeatedly emphasized that suspicionless drug testing passes constitutional muster only where it is aimed at specific and immediate threats. No such threat exists here. There is no evidence of a drug problem among Georgia's elected officials. Nor do such officials—ranging from the Public Service Commissioner to members of the General Assembly—(i) typically perform safety-sensitive tasks as to which momentary impairment can cause irreparable harm, or (ii) are on the front-lines of Georgia's drug interdiction efforts.

On the other hand, the privacy interests implicated by section 21-2-140 are substantial. The collection and testing of urine "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 617 (1989). The testing procedures implemented under the Georgia statute do little to minimize this inherent intrusion. Nor is the level of intrusiveness diminished by the fact that candidates may subject themselves to scrutiny by the media and the electorate. Such scrutiny does not mean that candidates for public office forfeit their expectations to be free from invasive and unreasonable *government* searches. Finally, the circumstances in which these privacy concerns arise distinguish this case from those in which this Court has upheld suspicionless drug testing. Section 21-2-140 treads upon fundamental voting and election privileges. As a precondition to qualification for elected office, section 21-2-140 requires candidates to submit to an intrusive drug test. For these reasons, Georgia Code Ann. § 21-2-140 is unconstitutional.

ARGUMENT

GEORGIA CODE ANN. § 21-2-140 VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourth Amendment abhors suspicionless searches. The "Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words.'"

Chimel v. California, 395 U.S. 752, 760-61 (1969) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)). Because that history shows that the primary concern of the drafters of Fourth Amendment was suspicionless searches, *see* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 487-517 (1995), this Court consistently has held that such searches are permissible only in the most "limited circumstances." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

In short, this Court applies a strong presumption against suspicionless searches. To "justify the intrusion on privacy entailed by conducting . . . searches without any measure of individualized suspicion," the government must show that: (1) the search serves compelling special needs, *Von Raab*, 489 U.S. at 665, 668; *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2394-95 (1995); and (2) "the privacy interests implicated by the search are minimal." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). As demonstrated below, respondents have failed to meet that burden with respect to section 21-2-140 of the Georgia Code.[3]

I. Respondents Have Failed to Show Sufficiently Compelling Special Needs to Justify the Suspicionless Drug Testing of Candidates for Elected Office in Georgia.

Comparing section 21-2-140 of the Georgia Code with the drug testing programs upheld in *Skinner*, *Von Raab* and *Acton* highlights respondents' failure to demonstrate sufficiently compelling needs to impose suspicionless drug testing on a broad array of candidates for elected office. *Skinner* involved Federal Railroad Administration ("FRA") regulations requiring testing of employees involved in train accidents. *Id.* at 606-07. The FRA

[3] It is now well settled that government-mandated urinalysis is a search that implicates the Fourth Amendment. *Skinner*, 489 U.S. at 617. Respondents concede that because section 21-2-140 requires candidates for elected office to submit to and pass a drug test, section 21-2-140 is a search under the Fourth Amendment. (*See* Respondents' Ct. App. Bf. at 9.)

adopted those regulations in the context of a documented history of drug abuse by train crews. Between 1975 and 1983, drug and alcohol impairment had caused at least 45 train accidents, 34 fatalities, 66 injuries and $28 million in property damages. *Id.* at 608. In light of this evidence, the Court carefully scrutinized the duties of the covered employees and determined that the FRA's asserted safety concerns were sufficiently compelling to justify drug testing. The Court noted that those subject to testing were engaged in "safety-sensitive tasks with such risks of injury to others that even a momentary lapse of attention c[ould] have disastrous consequences." *Id.* at 620, 628. Like those with "routine access to dangerous nuclear power facilities," the covered employees subject to testing "[could] cause great human loss before any signs of impairment became noticeable to supervisors or others." *Id.* at 628.

In *Von Raab*, the Court reviewed a testing regime that covered selected Customs Service employees: "front-line" drug enforcement personnel, those who carried firearms and those who handled classified material. *Von Raab*, 489 U.S. at 657, 660-61. Once again, the Court carefully scrutinized the covered positions. The Court determined that the Customs Service had a sufficiently compelling interest to justify the suspicionless testing of front-line drug enforcement personnel and those who carried firearms because these positions implicated immediate safety concerns. The duties of front-line drug enforcement personnel were "fraught with obvious dangers to the mission of the agency and the lives of Customs agents." *Id.* at 660-61. Many of these employees dealt directly with dangerous smugglers and were directly exposed to large amounts of illegal narcotics. *Id.* at 669. Similarly, those who carried firearms were required to "make instant life or death decisions." *Id.* at 661. Thus, "even a momentary lapse of attention [could] have disastrous consequences." *Id.* at 670. Significantly, though, the Court remanded to the court of appeals the question whether employees who handled classified material could be tested. The Court noted that the threat of harm attendant upon drug use by these employees appeared to be less immediate and direct. *Id.* at 678.

Finally, in *Acton*, the Court considered the mandatory drug testing of high school student-athletes. The school district had adopted its drug testing policy in response to what the Court

emphasized was an "immediate crisis." *Acton*, 115 S. Ct. at 2388, 2395. According to the school district, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion[.] [D]isciplinary actions had reached 'epidemic proportions,' [and] the rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture." *Id.* at 2395. The district had tried less intrusive measures—special classes, speakers, presentations, and drug-sniffing dogs—without success. *Id.* at 2389. The Court also emphasized that the consequences of drug use by a student-athlete were immediate and substantial. Among student-athletes, the Court observed, "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, [illegal] drugs . . . have been demonstrated to pose substantial risks to athletes." *Id.* at 2395. Only in light of these circumstances, as well as the diminished expectation of privacy enjoyed by children entrusted to the special care of the state, did the Court uphold the school district's drug testing program.

Fairly read, *Skinner*, *Von Raab* and *Acton* do not authorize the government to engage in suspicionless drug testing wherever it chooses. Rather, the Court's drug testing decisions have been carefully crafted to emphasize that suspicionless testing passes constitutional muster only where it is aimed at specific and immediate threats. No such justification can be offered in this case. At the outset, we note the lack of any record evidence—as there was in both *Skinner* (where there was substantial evidence of widespread substance abuse among the employees subject to testing) and *Acton* (where there was an "immediate crisis" caused by an alleged sharp rise in drug use among the student-athletes to be tested)—of a drug problem among the offices covered by section 21-2-140.

The only statutory objective offered by respondents—the desire to assure that those qualifying for the enumerated offices "have what it takes to exercise their best judgment" (Respondents' Ct.

App. Bf. at 15)[4]—is neither specific nor immediate. While assuring that those who have important responsibilities "have what it takes to exercise their best judgment" is a laudable goal, it is simply too general to justify suspicionless drug testing. If the government were able to overcome the Fourth Amendment's presumption against suspicionless searches by showing only that a government agency's or department's mission was important, and reciting the truism that the agency or department would more successfully achieve its mission if its employees were drug-free, then the presumption would have no meaning at all. Virtually any government employee or prospective government employee could be forced to submit to suspicionless searches. Such a result is, of course, fundamentally inconsistent with this Court's decisions. Suspicionless drug testing is permissible only in exceptional circumstances. As the Court specifically warned in *Acton*: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 2396.

Further, the threat of harm from which respondents claim they are protecting the public is too remote to justify suspicionless drug testing. While the positions for which candidates are subject to testing are unquestionably important, the threats posed by those elected to them are not analogous to those posed by the covered employees in *Skinner* and *Von Raab* or the student-athletes in *Acton*. A public official's pen simply does not present the same sort of dangers, with the same degree of immediacy, as a speeding train, a nuclear power plant, a firearm or even a helmeted football player.[5] Indeed, because of numerous checks and balances on their

---

[4] Since the Georgia Assembly has not articulated, either in the text of the statute, any preface thereto, or in any official legislative history, its purpose for enacting the statute, we must rely on counsel for respondents to articulate the government's purpose.

[5] Many of the positions covered by section 21-2-140 have absolutely no safety-sensitive responsibilities. The Secretary of State, for example, is responsible for enforcing Georgia's securities laws and corporations law, and has other record keeping duties. Georgia Code Ann. §§ 10-5-10, 14-5-20, 45-13-20. The Public Service Commission regulates utilities. Georgia Const. Art. 4, § 1, ¶ I. The Commissioner of Insurance presides over the Insurance Department. Georgia Code Ann. § 33-2-1. The

acts, elected officials cannot "cause great human loss before any signs of impairment become noticeable to . . . others." *Skinner*, 489 U.S. at 628. For example, members of the Georgia General Assembly cannot act alone. Elected officials within the executive branch must answer to the Governor. Actions of the executive branch (including those of the Governor) are carefully scrutinized by the press and the General Assembly. Judges are subject to discipline, impeachment and, in many cases, reversal on appeal. As the Court of Appeals for the D.C. Circuit wrote regarding a similar issue raised by the proposed testing of lawyers in the Department of Justice:

> Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train. . . . *Von Raab* and *Skinner* focused on the immediacy of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs. *Von Raab* provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.

Harmon v. Thornburgh, 878 F.2d 484, 491 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990) (emphasis omitted).

Nor are the covered offices here on the front-lines of drug interdiction. Members of the General Assembly, the Commissioner of Insurance, the Secretary of State, members of the Public Service Commission, the Commissioner of Agriculture and the Commissioner of Labor have no responsibilities involving drug interdiction. *See* Georgia Code Ann. §§ 10-5-10, 14-5-20, 45-13-20, 33-2-1, 2-2-7, 34-2-3; Georgia Const. Art. 4, § 1, ¶ I. While holders of the other offices may have some indirect involvement with the administration of Georgia's drug interdiction laws, they

---

Commissioner of Agriculture presides over the Department of Agriculture. Georgia Code Ann. § 2-2-7. The Commissioner of Labor presides over the Department of Labor. Georgia Code Ann. § 34-2-3.

are not typically involved in "front-line" drug interdiction. If indirect duties relating to the implementation and enforcement of our drug laws had sufficed in *Von Raab*, the Court would have upheld the Customs program in its entirety. *All* Customs employees have duties that relate in some way to one of the basic missions of the Customs Service—interdicting narcotics. Nonetheless, the Court declined to sanction (and remanded to the district court the issue of) the suspicionless testing of at least one group of Customs employees—those who were subject to suspicionless testing solely by virtue of their access to classified materials. *Von Raab*, 489 U.S. at 677-78.

To be sure, some of the positions covered by section 21-2-140 are exposed more closely to illegal drugs and drug users than are others. Nevertheless, the circumstances in which drug-related bribery, blackmail or violence might occur are much more remote for holders of those positions than they were for the Customs officials in *Von Raab*. The contacts those officials have with drug traffickers and illegal drugs are more unregulated and less controlled than those that any of the elected officials covered by section 21-2-140 would have in the course of their official duties. Accordingly, the record before this Court contains not a single instance of bribery or blackmail among or violence upon officials holding *any* of the covered positions. The possibility of such an occurrence simply does not offer a compelling justification for suspicionless drug testing here.

Of course, if the need for suspicionless drug testing in this case had been truly compelling—had the slip of an official's pen the same potential for immediate harm as a train operator's lapse—Georgia's testing regime would not be limited to candidates alone. It would provide for the testing of elected officials. Indeed, Section 21-2-140 is manifestly ineffective in achieving even respondents' own asserted goal of a government whose elected officials exercise judgment unimpaired by drugs. In choosing to test only candidates rather than office-holders, respondents have done little to ensure that their government is in fact drug free.

What this suggests, of course, is that the Georgia Assembly enacted section 21-2-140 as merely a symbolic gesture. According to one account, the bill was introduced to show the public that politicians are willing to take drug tests as well as impose them on

others. Edith M. Shine, *Crimes and Offenses*, 9 Ga. St. U. L. Rev. 212, 218 (1992). Similarly, perhaps the Georgia Assembly simply wanted to build public confidence by showing that leaders in the Georgia government are drug free. Either purpose would be impermissible. As Justice Scalia has written: "[T]he impairment of individual liberties cannot be the means of making a point. [S]ymbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Von Raab*, 109 S. Ct. at 1401-02 (Scalia, J., dissenting).[6]

Nor can respondents justify section 21-2-140 as a means of assuring Georgia's citizens that those occupying important elected positions in Georgia's government are firmly committed to winning the war against drugs. Such a viewpoint-based restriction on holding public office would be flatly inconsistent with the First Amendment. In *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966), this Court held that the Georgia House of Representative's exclusion of an elected Representative because of his criticism of the government's policy in Vietnam violated the First Amendment. The Court explained that "the manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 135-36 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). This would be an empty holding indeed if the government could stop any candidate who held an unpopular view from running for office.

There may well be citizens of Georgia who share a commitment to the Fourth Amendment and would wish to support a candidate who is likewise opposed to suspicionless drug testing. That ought

---

[6] Although the Commissioner of the Customs Service had declared that the drug testing program at issue in *Von Raab* "'would set an important example in our country's struggle with this most serious threat to our national health and security,'" 489 U.S. at 686 (Scalia, J., dissenting) (citation omitted), the Court declined to rely on that rationale in its opinion, focusing instead on the specific threats posed by drug use in the positions subject to testing.

to be their choice, just as others may choose to vote against a candidate for similar reasons. Thus, the fact that this case involves electoral politics undermines, rather than supports, the government's asserted interest in testing.

II. The Suspicionless Drug Testing Program Here at Issue Is a Substantial Invasion Upon Petitioners' Privacy Interests

As the preceding analysis demonstrates, the government's concerns under the Georgia statute are lacking in both immediacy and efficacy. The same cannot be said for petitioners' privacy interests. First, no matter how discreet, "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617. Second, the testing regime at issue—from the collection procedures to the timing of the drug test—does little to minimize the intrusion inherent in drug testing. Third, that candidates for public office may subject themselves to scrutiny by the media and electorate does not mean that they forfeit the expectation that they will be free from government-sponsored searches. Finally, the context in which these privacy concerns arise distinguishes this case from those in which the Court has upheld suspicionless drug testing. Much more is at stake here than the right to play high school football or even to apply for a government job. Section 21-2-140 implicates fundamental voting and election privileges inherent in our democratic form of government.

Any drug test, no matter how carefully tailored, interferes with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Winston v. Lee*, 470 U.S. 753, 758 (1985) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), and the right to be free from government surveillance. *Katz v. United States*, 389 U.S. 347, 359 (1967).[7] By its very nature, drug testing affects significant privacy

---

[7] Almost all lower courts have followed this Court's characterization of the privacy interest. *See also National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 974 (D.C. Cir. 1990) ("[M]andatory urinalysis represents a substantial intrusion on employee privacy."); *Taylor v. O'Grady*, 888 F.2d 1189, 1197 (7th Cir. 1989) ("All urinalysis programs implicate serious privacy concerns regardless of how carefully tailored

concerns. It violates the subject's bodily integrity, discloses information "concerning the state of the subject's body, and the materials he [or she] has ingested," *Acton*, 115 S. Ct. at 2393, and necessarily requires a lowering of the "traditional[] shield[]," *Skinner*, 489 U.S. at 626, around the excretory function. As this Court has noted: "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all." *Skinner*, 489 U.S. at 617.[8]

The testing procedures contemplated by section 21-2-140 do not appreciably lessen the nature of this intrusion. At the time a candidate qualifies for nomination or election,[9] the candidate must submit a certificate from an HHS-certified laboratory stating that he or she has been tested within the prior 30 days and has tested negative for non-prescriptive marijuana, cocaine, opiates, amphetamines and phencyclidines.

While section 21-2-140 allows a candidate to produce the urine specimen at a physician's office, any salutary effect that allowance might have on the candidate's personal dignity is substantially undermined by the collection procedures the physician's office is required to follow in accordance with the HHS Guidelines. A candidate must: remove all unnecessary outer garments; wash and dry his or her hands; prior to providing the specimen, "remain in the presence of the collection site person and . . . not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen"; and provide the specimen in a stall or otherwise partitioned area. HHS Guidelines § 2.2 (f). Prior to urination, the person collecting the specimen must observe the prospective candidate and note any

---

the program is designed.").

[8] *See also* Charles Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968) ("[I]n our culture the excretory function are shielded by more or less absolute privacy, so much so that situations in which the privacy is violated are experienced as extremely distrescing, as detracting from one's dignity and self esteem.").

[9] *See* Georgia Code Ann. § 21-2-132 (giving a candidate a five day window in which to qualify).

unusual behavior or appearance. *Id.* The person collecting the specimen also must remain in the room during urination, outside the stall or partition. Within four minutes after urination, the temperature of the specimen is gauged. *Id.* Finally, if tampering is suspected, then a second specimen must be provided under direct observation. *Id.*

In addition, if the candidate is taking any of the proscribed substances pursuant to a medical prescription or if the candidate is taking any other medication that might interfere with testing result, the candidate will need to disclose the medication to the laboratory. Thus, even if a candidate chooses (and is able)[10] to provide a urine specimen to his or her own physician, he or she may nevertheless be required to disclose personal medical information to a complete stranger. In *Acton*, the Court observed that advance disclosure of such medical information is a "cause for concern." *Id.* at 2394. Similarly, one of the consequences of the requirement that a candidate take the test within 30 days before qualifying for nomination or election is that it will be extremely difficult for a candidate to maintain the confidentiality of a positive test result. If, for example, a candidate is nominated by his or her political party, and then withdraws from the race, such withdrawal will invariably raise suspicions that it was prompted by a failed drug test. Accordingly, section 21-2-140 does not allow for the same degree of privacy in test results as any of the programs this Court has previously upheld.

Petitioners do not have diminished expectations of privacy by virtue of running for office. In *Von Raab*, this Court noted that "background investigations, medical examinations, or other intrusions . . . may be expected to diminish their expectations of privacy in respect of a urinalysis test." 489 U.S. at 677. Similarly, in *Acton*, the Court observed that student-athletes had a "decreased expectation of privacy" because "school locker rooms . . . are not notable for the privacy they afford," and because students who participate in athletics "subject themselves to a degree of regulation even higher than that imposed on students generally."

---

[10] Given the burdens imposed by the HHS Guidelines, it remains to be seen whether private physicians will make themselves available for qualifying drug tests.

115 S. Ct. at 2392-93. This case does not involve such diminished expectations. Candidates for public office in Georgia are subjected neither to compulsory medical examinations, to rigorous background checks, nor to communal showers.

Respondents contend that qualified candidates should have a diminished expectation of privacy because they already must make certain financial disclosures under Georgia law. *See* Georgia Code Ann. § 21-5-50. But financial disclosure requirements are simply not as invasive as mandatory urinalysis drug testing. The most obvious difference is that drug testing "deal[s] with intrusions into the human body rather than with state interferences with property relationships or private papers. . . ." *Winston* , 470 U.S. at 760 (quoting *Schmerber v. California*, 384 U.S. 757, 767-768). Violations of bodily integrity implicate the "most personal and deep-rooted expectations of privacy." *Id.* To hold that a financial disclosure requirement so diminishes a candidate's expectation of privacy to justify drug testing is to stretch this Court's Fourth Amendment jurisprudence beyond recognition.

The fact that candidates for public office are subjected to public scrutiny by the news media and the electorate obviously has no effect on the scope of their rights under the Fourth Amendment; otherwise sports heroes and movie stars trailed by *paparazzi* photographers would have no Fourth Amendment rights at all. Whatever access to their personal lives movie stars or political candidates voluntarily grant to the media is irrelevant to the government's power to invade their privacy without their consent. As this Court has noted, "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the *State*." *Schmerber*, 384 U.S. at 767 (emphasis added).[11] Indeed, the very existence of media and

[11] Similarly, a decrease in privacy expectations may not be justified by the prevalence of applicant testing among large private employers. Reliance on this factor to define the proper boundaries of Fourth Amendment reasonableness would be a marked departure from the decisions of this Court; it would suggest that an otherwise unlawful search can be made lawful if it is performed frequently enough by non-governmental entities. The existence of suspicionless urinalysis testing in the private sector cannot of its own force legitimize a search objectively considered intrusive, such as compulsory urinalysis. The most obvious reason is that the Fourth Amendment's constraints do not apply to the private sector. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment applied only to government searches). Thus, nowhere in *Von Raab*, *Skinner* or *Acton* did this Court consider private employer practices in gauging the privacy expectations of those whom the government would search. Any attempt to import private industry norms in the Fourth Amendment balance would result in a kind of constitutional privatization alien to our most cherished traditions. It turns on its head Justice Brandeis' famous aphorism—articulated in a Fourth Amendment case—that government is "the potent, the omnipresent teacher" that "[f]or good or for ill . . . teaches the whole people by its example." *Olmstead v. United States, supra*, 277 U.S. at 485 (Brandeis, J., dissenting), *overruled, Katz v. United States*, 389 U.S. 347 (1967). The protections of the Fourth Amendment will quickly vanish if courts adopt the conduct of the private sector as the benchmark of "reasonableness." Even when acting as employer, the government is held to a standard that private actors are not—the Constitution of the United States.

public scrutiny of political candidates undercuts the State's justification for drug testing, for the election campaign itself is the best test of whether a candidate "ha[s] what it takes" to exercise good judgment.

Nor does a candidate's advance warning of a drug testing requirement, or his or her ability to avoid the testing process by withdrawing from nomination or election, justify a lower expectation of privacy. If simply by providing advance notice the government could make lawful an otherwise suspicionless search, candidates could be subjected to suspicionless, warrantless searches of their homes as a precondition of public employment. This same factor wa present in *Von Raab*, but the Court attributed very little significance to it. Indeed, while advance notice might "reduc[e] to a minimum any 'unsettling show of authority' that may be associated with unexpected intrusions on privacy," *Von Raab*, 489 U.S. at 672 n.2 (citation omitted), it does not reduce the other unsettling aspects of an intrusive search—the loss of personal privacy and dignity and the violation of bodily integrity. The government cannot avoid the dictates of the Fourth Amendment simply by giving notice of an impending intrusion.

Finally, the liberty interests at stake here go beyond those at issue in *Skinner, Von Raab* and *Acton*. This case involves much

more than the right of a student to participate in school athletics or the right of an adult to hold a job. While a prospective candidate can "choose" not to run for office, just as a prospective applicant can "choose" not to apply for a job or an athlete can "choose" not to try out for a team, we ought to be far more circumspect in burdening the first of these choices. As this Court has declared, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The ramifications of this case go directly to the core of our democratic system—a candidate's right to run for elected office, and the right of the electorate, and not the government, to decide whether that candidate is qualified for public office.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and hold that section 21-2-140 violates the Fourth Amendment Prohibition of unreasonable searches and seizures.

Respectfully submitted,

STEVEN R. SHAPIRO
ACLU FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

STEPHEN H. SACHS
Counsel of Record
STEPHEN M. CUTLER
EDWARD P. SULLIVAN
WILMER, CUTLER, & PICKERING
2445 M. Street, N.W.
Washington, D.C. 20037
(202) 663-6000

GERALD R. WEBER
ACLU OF GEORGIA
142 Mitchell Street, S.W.
Atlanta, GA 30303
(404) 523-6201

ARTHUR B. SPITZER
ACLU OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

BARBARA BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
C/O UNIVERSITY OF NEW MEXICO
SCHOOL OF LAW
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

November 12, 1996

Counsel for Amici Curiae

No. 96-156

FILED
DEC 30 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,
Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner
Department of Human Resources, State of Georgia,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE, INC. IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Richard K. Willard
Counsel of Record
K. Lee Blalack, II
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-3000

Date: December 16, 1996

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Table of Authorities iii

Interests of Amici Curiae 1

Summary of Argument 2

Argument 4

I. The Constitution Allows States to Impose a Wide Variety of Eligibility Requirements for Holding State and Local Office If the Requirements Rationally Relate to the Duties of the Office 4

A. States Possess Broad Authority to Establish the Qualifications for Elective Office 4

B. Mandatory Drug Testing Is an Eligibility Requirement for Holding Public Office That Is Similar to Other Types of Candidate Qualifications 5

C. Mandatory Drug Testing of Candidates Does Not Impermissibly Burden the Constitutional Rights of Candidates or Voters 10

II. Mandatory Drug Testing of Prospective Candidates Furthers Two Legitimate and Important State Interests 19

A. Mandatory Drug Testing of Prospective Candidates Furthers the State's Interest in Preventing the Abuse of Public Trust by Elected Officials 19

B. Mandatory Drug Testing of Prospective Candidates Furthers the State's Interest in the Public Accountability of Elected Officials 24

Concusion 27

TABLE OF AUTHORITIES

CASES **Page**

Adams v. Askew, 511 F.2d 700 (5th Cir. 1975) . 5, 14
Anderson v. Celebrezze,
460 U.S. 780 (1983) 5, 10, 18
Barry v. City of New York,
712 F.2d 1554 (2d Cir. 1983) 12
Brown v. Hartlage, 456 U.S. 45 (1982) 19
Bullock v. Carter, 405 U.S. 134 (1972) 4, 5
Burdick v. Takushi,
504 U.S. 428 (1992) 5, 10, 17, 18
Carey v. Population Servs. Int'l,
431 U.S. 678 (1977) 25
Chandler v. Miller, 73 F.3d 1543 (11th Cir. 1995) . 17
City of Akron v. Bell,
660 F.2d 166 (6th Cir. 1981) 5
Clements v. Fashing, 457 U.S. 957 (1982) . 5,10,17,19
Combs v. Huff, 858 S.W.2d 160 (Ky. 1993) 18
Committee on Legal Ethics of W. Va. State Bar v.
Roark, 382 S.E.2d 313 (W. Va. 1989) 22
Communist Party of Indiana v. Whitcomb,
414 U.S. 441 (1974) 16
DeMasi v. Weiss, 669 F.2d 114 (3d Cir. 1982) . . . 12
Fraternal Order of Police, Lodge No. 5 v. City of
Philadelphia, 812 F.2d 105 (3d Cir. 1987) 12

Gregory v. Ashcroft,
501 U.S. 452 (1991) 7,9,19,20,24
Hankins v. Hawaii,
639 F. Supp. 1552 (D. Haw. 1986) 5
MacDonald v. City of Henderson,
818 F. Supp. 303 (D. Nev. 1993) 18
Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 23
National Treasury Employees Union v. von Raab,
489 U.S. 656 (1989) 12
Plante v. Gonzalez,
575 F.2d 1119 (5th Cir. 1978) 13,14,18
Rockefeller v. Powers,
74 F.3d 1367 (2d Cir. 1995) 18
Storer v. Brown, 415 U.S. 724 (1974) 4
United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) . . 17
United States v. Barry,
938 F.2d 1327 (D.C. Cir. 1991) 22, 24
United States v. Mississippi Valley Generating Co.,
364 U.S. 520 (1961) 20

STATUTES

2 U.S.C. §§ 1301-1438 (Supp. 1995) 26
Alaska Stat. §§ 39.50.010, 39.50.020 (Michie 1996) 17
Cal. Gov't Code § 3000 (West 1995) 16, 20

Colo. Rev. Stat. Ann. § 1-4-501(2) (West 1996) . . 10
Fla. Const. art. 6, § 4(a) (West 1995) 16, 20
Ga. Code Ann. § 45-2-1(1)-(6) (1996) 6, 16
Ill. Comp. Stat. Ann. 5/3.1-10-5 (West 1996) . . . 7, 8
Ind. Code Ann. § 3-8-1-5 (West 1988) 7, 16, 20
Iowa Code Ann. §§ 43.18, 43.67 (West 1991) 7
Mi. Comp. Laws Ann.
§§ 168.392a, 168.413a, 168.426a (West 1989) . . . 7
Mich. Comp. Laws Ann. § 201.3 (West 1989) 7, 16, 20
Miss. Code Ann. § 23-15-11, 23-15-299 (1995) 7
Mo. Const. art. V, § 26 (1989) 7
Mont. Const. art. IV, § 4 (1995) 20
N.J. Stat. Ann. § 54:1-35.25 (West 1986) 8
N.M. Stat. Ann. § 10-16A-3(G) (Michie 1995) . . . 11
N.Y. Pub. Off. Law § 3 (McKinney 1988) 7
Nev. Rev. Stat. §§ 281.561, 281.571 (1996) . . 11, 12
Ohio Rev. Code Ann. § 311.01 (Banks-Baldwin 1995) 8
Okla. Stat. Ann. tit. 26, § 5-105a(A) (West 1991) . . 20
25 Pa. Cons. Stat. Ann. § 2911 (West 1994) 7
Vt. Const. Ch. II, § 35 (1985) 7

MISCELLANEOUS

Arnold H. Lubasch, *Housing Aides Are Charged in Bribe Plan*, N.Y. Times, Feb. 10, 1989, at B1 . . 21
Asbury Park Press, Mar. 3, 1996, § AA, at 4 22
Bill McAllister, *Presidential Plan for Drug Testing of Federal Workers Suffers Setback: Senate Panel*

Votes to Exempt VA Employees from Executive Order, Wash. Post, Aug. 4, 1987 . . . . 14, 15

Cooperhill Mayor Faces Charges of Growing Marijuana, State News Briefs, July 17, 1996, at 1 22

Deborah Kelly, *Informer Receives 6 Months in Jail; Man Helped Police in Richardson Case*, Richmond Times-Dispatch, Nov. 29, 1995, at B-1 . . . 22

Dirk Johnson, *The Race for Congress; Amenta in Uphill Fight Against Johnson*, N.Y. Times, Oct. 26, 1986, § 11CN 15

Dole: "I'm Talking the Issues", United Press Int'l, Jan. 11, 1988, at 1 15

Eliot Brenner, *Senate Considers Sweeping Anti-Drug Measure*, United Press Int'l, Oct. 4, 1989 . . 14

Maxine Bernstein, *Drug Charges Dropped Against City Worker*, Hartford Courant, May 10, 1996 . . 22

Maya Bell, *Politician Says Tale of Sex, Crack All Lies; A Miami Mayoral Candidate Claims Criminals Are Trying to Frame Him*, Orlando Sentinel Trib., May 16, 1992, at A1 21

Mayor, Wife Face Counts in Drug Case, Arkansas Democrat-Gazette, Apr. 20, 1995, at 4B . . . 22

Mike Causey, *Drug Testing Guidelines*, Wash. Post, Apr. 8, 1988, at B2 14

Phyllis T. Bookspan, *Jar Wars: Employee Drug Testing, The Constitution, and the American Drug Problem*, 26 Am. Crim. L. Rev. 359 (1988) . 12

Robert L. Koenig, *Subway Crash Reignites Drug-Testing Debate*, St. Louis Post-Dispatch, Aug. 30, 1991, at 1A 15

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

No. 96-126

WALKER L. CHANDLER; SHARON T. HARRIS; JAMES D. WALKER,
Petitioners,
v.
ZELL D. MILLER, Governor; MAX CLELAND, Secretary of State; JAMES G. LEDBETTER, Commissioner Department of Human Resources State of Georgia
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE, INC. IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and the administrative process in

a variety of areas of the law, WLF devotes a substantial portion of its resources to supporting the Nation's war against drug abuse. To that end, WLF has appeared as an amicus curiae before federal and state courts in cases involving drug testing. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995); *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991), *Loder v. City of Glendale*, 34 Cal. Rptr. 2d 94 (Cal. App. 2 Dist. 1994).

Parents' Association to Neutralize Drug & Alcohol Abuse, Inc. (PANDAA) is a national non-profit organization dedicated to curtailing illegal drug use, especially by our Nation's youth. PANDAA has appeared with WLF as amicus curiae in cases involving drug testing, including *Vernonia School District 47J*, and believes that drug testing requirements in this case for candidates for office sends a strong message to our youth that those who seek to hold office to enact or enforce our drug laws are themselves even subject to drug testing. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The State of Georgia requires candidates for specified elective offices to certify that they have taken and passed a drug test. The statute imposes a reasonable requirement that candidates demonstrate fitness for office.

States can and do impose a wide variety of restrictions on candidates for office. So long as states do not discriminate against particular viewpoints, they should be

permitted to impose restrictions that are rationally related to the duties of the office.

A drug testing requirement does not impose a viewpoint restriction. A candidate's policy views on drug legalization or drug testing are not affected by compliance with this requirement. Otherwise, candidates opposed on policy grounds to other ballot access requirements, such as financial disclosure or campaign finance laws, could seek to avoid compliance on the same theory.

The State of Georgia has a very strong interest in deterring drug users from seeking and holding public office. Drug users demonstrate a willingness to engage in unlawful conduct that is incompatible with the public trust reposed in elected officials. Drug using public officials are subject to blackmail and the temptation to engage in corrupt conduct to fund a drug habit. If a state can insist that its police officers and prison guards be drug free, then the same demand can legitimately be made of its legislators, judges, and other high elected officials. Otherwise, the state would engage in a double standard in which high-ranking officials are exempt from the requirements imposed on rank-and-file employees.

Although drug use by high-ranking officials may be relatively rare, it is not unknown and the consequences may be much more severe than in the case of an ordinary state employee. The Constitution does not preclude a state from determining that drug testing is a reasonable means to assure the fitness of candidates for office.

ARGUMENT

I. THE CONSTITUTION ALLOWS STATES TO IMPOSE A WIDE VARIETY OF ELIGIBILITY REQUIREMENTS FOR HOLDING STATE AND LOCAL OFFICE IF THE REQUIREMENTS RATIONALLY RELATE TO THE DUTIES OF THE OFFICE

A. States Possess Broad Authority to Establish the Qualifications for Elective Office

States generally have broad powers to determine the qualifications of voters and candidates. *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972).

> States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Storer v. Brown, 415 U.S. 724, 730 (1974).

Election laws inevitably impose burdens on the speech and associational rights of candidates and voters, but

> not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). Thus, while the right to vote is undeniably a fundamental right, the right to present oneself as a candidate has never been afforded fundamental status. *E.g.*, *Bullock*, 405 U.S. at 142-43; *City of Akron v. Bell*, 660 F.2d 166, 169 (6th Cir. 1981); *Adams v. Askew*, 511 F.2d 700, 703 (5th Cir. 1975); *Hankins v. Hawaii*, 639 F. Supp. 1552, 1555 (D. Haw. 1986). "Far from recognizing candidacy as a 'fundamental right,'" the Court has "held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting *Bullock*, 405 U.S. at 143); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

B. Mandatory Drug Testing Is an Eligibility Requirement for Holding Public Office That Is Similar to Other Types of Candidate Qualifications

Georgia's drug testing requirement for prospective candidates is not an isolated limitation on access to the State and local ballot. Rather, Georgia's law, O.C.G.A. section 21-2-140, is only one of several eligibility requirements that Georgia has democratically determined are suitable prerequisites for public office. Georgia has identified the following persons as ineligible to stand for election to State and local offices:

> Persons who are not qualified voters in Georgia;
>
> Persons who are not citizens of Georgia;
>
> Persons who are not twenty-one (21) years of age, except certain local offices are available to persons eighteen (18) years old and above;

Persons who are candidates for county or municipal offices but who have not been residents of the county or municipality for the preceding twelve (12) months;

Persons who hold or receive public monies for the State or any county but who have refused to account or pay for same when called upon to do so by the appropriate government official;

Persons who have been convicted of a felony involving moral turpitude under the laws of Georgia or any other state if the offense is also a felony in that state, unless the person's rights of citizenship have been fully restored by pardon;

Persons who hold any elective or appointive office in the federal government, other than that of postmaster or as a member of the armed forces, as well as persons holding any elective or appointive office in the government of any other state; and

Persons who are of unsound mind or, who because of advanced age or bodily infirmity, are incapable of discharging the duties of the elective office.

GA. CODE ANN. § 45-2-1(1)-(6) (1996).[1] Georgia's eligibility requirements are comparable to the

[1]These candidate qualifications also apply to office holders and are sufficient grounds for vacating any State or local office. GA. CODE ANN. § 45-2-1.

comprehensive ballot access statutes enacted by other States.[2]

Moreover, Georgia's drug testing requirement for prospective candidates is a ballot access regulation that is of a character similar to candidate eligibility requirements adopted by States and municipalities throughout the nation. For example, many States condition a candidate's eligibility for elective office or an office holder's right to remain in office on the age of the candidate.[3] Most States disqualify voters and candidates who have been convicted of a felony

[2]*See, e.g.*, ILL. COMP. STAT. ANN. 5/3.1-10-5 (West 1996); IND. CODE ANN. § 3-8-1-5 (West 1988); IOWA CODE ANN. § 43.67 (West 1991); MICH. COMP. LAWS ANN. § 201.3 (West 1989) (listing many of the same qualifications identified in the Georgia statute as grounds for vacating an elected office); MISS. CODE ANN. §§ 23-15-11, 23-15-299 (1995); N.Y. PUB. OFF. LAW § 3 (McKinney 1988); 25 PA. CONS. STAT. ANN. § 2911 (West 1994).

[3] Most States have adopted minimum age requirements as prerequisites for holding public office. See Appendix A for survey of statutes setting minimum age requirements. Several States have enacted maximum age requirements for elected positions such as judicial offices. *See, e.g.*, MI. COMP. LAWS ANN. §§ 168.392a, 168.413a, 168.426a (West 1989) (requiring candidates for state judiciary to certify that they "will not have attained age 70 years prior to the date of election"); VT. CONST. CH. II, § 35 (1985) (imposing mandatory retirement age of 70 for members of Vermont judiciary); MO. CONST. ART. V, § 26 (1989) (imposing mandatory retirement age of 70 on state court judges). *See also Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (rejecting equal protection challenge to Missouri's mandatory retirement provision under a rational basis test).

or of crimes involving moral turpitude.[4] Some States do not allow persons who are mentally incompetent to run for office or vote.[5] Many jurisdictions impose educational or professional requirements on candidates for certain types of elected positions such as judgeships or school superintendents.[6] Some States have adopted so-called "resign-to-run" statutes that prevent a candidate from simultaneously seeking two elected offices or from pursuing an elected position if he or she already holds

---

[4] See Appendix B for survey of statutes disqualifying candidates and office holders because of criminal convictions.

[5] See Appendix C for survey of statutes disqualifying candidates of unsound mind or vacating public offices upon a determination of mental incompetence.

[6] See Appendix D for survey of statutes requiring candidates for judicial offices and prosecuting attorneys to be lawyers who have been active members of the state bar. In addition, some States require a candidate to demonstrate unique training or educational experience before becoming a candidate for special elected positions. *See, e.g.*, ILL. COMP. STAT. ANN. 5/3-1 (West 1993) (disqualifying any candidate for the office of regional superintendent of schools who has not attained a master's degree, 20 semester hours of credit in professional education at the graduate level, and four years of teaching experience); N.J. STAT. ANN. § 54:1-35.25 (West 1986) (requiring candidate for elected office of tax assessor to pass written examination and complete a four year degree program); OHIO REV. CODE ANN. § 311.01 (Banks-Baldwin 1995) (requiring candidate for elected office of sheriff to have attained a high school diploma or its equivalent, a valid certificate of law enforcement training, and to submit to a fingerprint search of criminal records).

public office.[7] In addition, many States will not place the name of a candidate for public office on the ballot unless the candidate has filed a detailed financial disclosure statement setting forth the candidate's personal and family sources of income.[8]

All of these eligibility restrictions are legislative classifications that permissibly limit the field of available candidates for elective office. None of these classifications burden the rights of "suspect classes" or a constitutional right that has been deemed "fundamental".[9] Therefore, when Georgia's drug testing requirement for prospective candidates is viewed against the spectrum of other eligibility requirements, it is clear that O.C.G.A. section 21-2-140 is a permissible ballot access regulation.

---

[7] See Appendix E for survey of statutes disqualifying candidates for office if they currently occupy another elected office.

[8] See Appendix F for survey of statutes conditioning eligibility for public office on the filing of a personal financial disclosure statement. These statutes are not campaign disclosure requirements but rather laws that require the prospective candidate to reveal sources of personal income.

[9] *Gregory*, 501 U.S. at 470-71 (holding that, unless the candidate eligibility requirement burdens the rights of members of a suspect class or a constitutional right that is fundamental, requirement need only satisfy rational basis test).

C. Mandatory Drug Testing of Candidates Does Not Impermissibly Burden the Constitutional Rights of Candidates or Voters

Petitioners contend that O.C.G.A. section 21-2-140 improperly restricts the rights of voters to choose their elected officials. Pet'rs' Br. at 33. This argument begs the question. All ballot access measures restrict to some degree the rights of voters to select their elected representatives. *Anderson*, 460 U.S. at 788. For example, Colorado law provides that "[n]o person is eligible to be a candidate for more than one office at one time[.]" COLO. REV. STAT. ANN. § 1-4-501(2) (West 1996). This law clearly limits the choice of Colorado voters by denying them the opportunity to accept or reject a candidate who seeks more than one public office. Yet, this Court has found such limitations to be only a "*de minimis* interference" with the rights of candidates and voters. *Clements*, 457 U.S. at 971-72 (upholding, against First and Fourteenth Amendment challenge, Texas law that disqualified prospective candidates if they occupied another public office).

The issue is not whether a ballot access regulation limits the choice of voters to select a particular candidate; the issue is the extent to which the challenged eligibility requirement burdens the First and Fourteenth Amendment rights of voters. *See Burdick*, 504 U.S. at 433; *Anderson*, 460 U.S. at 789. Petitioners argue that Georgia's drug testing requirement is a severe restriction on their rights of free speech because it forces them to submit to what they consider to be an illegal search. Pet'rs' Br. at 25-26. The Court should reject this argument for three reasons.

First, Georgia does not compel its citizens to take a drug test but merely conditions a candidate's eligibility for the ballot on the candidate testing negative for certain designated narcotics. In this regard, O.C.G.A. section 21-2-140 is very similar to the financial disclosure requirements enacted by many States. For instance, New Mexico law provides that

> [a]ny candidate for a legislative or statewide office who fails or refuses to file a financial disclosure statement . . . before the final date for the withdrawal of candidates . . . shall not have his name printed on the election ballot.

N.M. STAT. ANN. § 10-16A-3(G) (Michie 1995). In order to comply with this requirement, a candidate and the candidate's spouse must reveal, *inter alia*, 1) all sources of gross income of more than $5,000; 2) a general description of the type of real estate owned in New Mexico other than a personal residence; 3) all New Mexico business interests valued in excess of $10,000 and any position held in the business; 4) any memberships on the boards of for-profit enterprises in New Mexico; 5) all New Mexico professional licenses; and 6) any state agency to which the candidate or spouse sold goods or provided services in excess of $5,000. *Id.* § 10-16A-3(A)-(C).[10]

---

[10] Nevada law also illustrates the operation of financial disclosure requirements for candidates. NEV. REV. STAT. § 281.561 (1977). The candidate must reveal his or her length of residence in Nevada; each source of income, including the income of any members of the candidate's household; the specific location and use of any real estate other than a personal residence; the names of each creditor to whom the candidate or

(continued...)

Requiring a candidate and the candidate's spouse to reveal in detail their sources of personal income is arguably more invasive than the drug testing requirement of O.C.G.A. section 21-2-140.[11] "It can scarcely be denied that the public exposure of one's wallet or purse is, in the abstract, an invasion of privacy." *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982). Unlike a drug test -- which discloses only whether an individual has engaged in illegal conduct -- financial disclosure encompasses many perfectly

---

[10](...continued)
family member owes certain types of debts in excess of $5,000; certain gifts valued in excess of $200 which the candidate received during the previous taxable year; and a list of each business entity with which the candidate or family member is involved as an officer, director, trustee or which the candidate or family member owns in excess of 1% of the outstanding stock. *Id.* § 281.571(1).

[11] Phyllis T. Bookspan, *Jar Wars: Employee Drug Testing, The Constitution, and the American Drug Problem*, 26 AM. CRIM. L. REV. 359, 400 (1988) (noting that, during oral argument in *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989), "Justice Scalia suggested that the financial disclosure required of federal judges may be more intrusive than the drug test" challenged in that case). Courts have widely recognized the intrusive nature of financial disclosure statutes. *See, e.g., Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 118 (3d Cir. 1987) (commenting that "[i]t would be incompatible with the concept of privacy to permit protected [financial] information and material to be publicly disclosed"); *Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir. 1983) ("[P]ublic disclosure of financial information may be personally embarrassing and highly intrusive.").

legal but often highly personal matters.[12] Federal courts, however, have generally sustained financial disclosure statutes from challenges filed by candidates who claimed infringement of their right to seek elected office and their right to privacy.

In *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), the Fifth Circuit upheld Florida's requirement that candidates for elected office submit extensive and detailed information regarding the candidate's personal finances and business interests. Writing for the court, Judge John Minor Wisdom acknowledged that "[d]isclosure requirements may deter some people from seeking office," but he noted that

> mere deterrence is not sufficient for a successful constitutional attack. Otherwise, official salary levels or the location of the capital city might furnish the basis for a constitutional attack.

Id. at 1126. The Fifth Circuit sustained Florida's statute because

> the disclosure requirements d[id] not limit the choices of any particular group of voters. There [wa]s no reason to believe that those most sensitive to their privacy w[ould] be Republicans or Democrats, liberals or conservatives, blacks or whites.

---

[12] A financial disclosure statute structured like O.C.G.A. § 21-2-140 would permit confidential submission of financial data to a public accountant, with a public certification that the data revealed no conflict of interest or other illicit activity.

Id at 1127.[13]

The same can be said of Georgia's drug testing requirement. O.C.G.A. section 21-2-140 applies to all candidates for State and local office without regard to party affiliation or viewpoint. There is no reason to believe that petitioners and members of the Libertarian Party are the only candidates that oppose drug testing. Political opposition to mandatory testing programs has generally crossed party lines.[14] Indeed, many prominent Republicans

---

[13] *See also Adams*, 511 F.2d at 703 ("Voters' rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements. They are no more affected by a candidate's unwillingness to pay a reasonable filing fee than they are when he refuses to comply with financial disclosure laws, or, for that matter, a reasonable petitioning requirement.").

[14] *E.g.*, Eliot Brenner, *Senate Considers Sweeping Anti-Drug Measure*, UNITED PRESS INT'L, Oct. 4, 1989, at 1, *available in* LEXIS, News Library, Wire File (noting that Senate rejected President Bush's proposal to require mandatory drug testing for prisoners, parolees, and persons free on bail and that proposal "ran into stiff opposition from Democrats and Republicans"); Bill McAllister, *Presidential Plan for Drug Testing of Federal Workers Suffers Setback: Senate Panel Votes to Exempt VA Employees from Executive Order*, WASH. POST, Aug. 4, 1987, at A13 (explaining that the Senate Veteran's Affairs Committee rejected President Reagan's plan for drug testing most of the employees working for the Veteran's Administration and that a bipartisan group of Republican and Democratic Senators defeated the bill in committee); Mike Causey, *Drug Testing Guidelines*, WASH. POST, Apr. 8, 1988, at B2 (discussing congressional task force monitoring legislation affecting civil service employees and

(continued...)

and Democrats have voiced opposition to mandatory drug testing.[15] Therefore, O.C.G.A. section 21-2-140 does not discriminate against any particular group of voters.

Second, Georgia's drug testing requirement does not regulate advocacy by candidates. Contrary to petitioners' suggestion, O.C.G.A. section 21-2-140 does not exclude candidates who oppose the so-called "war on drugs", candidates who oppose drug testing, or candidates that favor legalization of drugs. A candidate's viewpoint is not a relevant consideration under the statute. The statute only excludes candidates that fail to certify passing a drug test.

---

[14](...continued)
that group consisted of both Democrats and Republicans that "generally favor limiting drug testing to jobs involved in health, safety or national security").

[15] The Republican Party's 1996 nominee for Vice-President, Jack Kemp, has publicly opposed mandatory drug testing of high school students. *Dole: "I'm Talking the Issues"*, UNITED PRESS INT'L, Jan. 11, 1988, at 1, *available in* LEXIS, News Library, Wire File. Other prominent opponents of mandatory drug testing include Republican Congresswoman Nancy Johnson of Connecticut, as well as Democratic Congressmen Steny Hoyer of Maryland and William Clay of Missouri. Dirk Johnson, *The Race for Congress; Amenta in Uphill Fight Against Johnson*, N.Y. TIMES, Oct. 26, 1986, § 11CN, at 1; Bill McAllister, *Presidential Plan for Drug Testing of Federal Workers Suffers Setback: Senate Panel Votes to Exempt VA Employees from Executive Order*, WASH. POST, Aug. 4, 1987, at A13; Robert L. Koenig, *Subway Crash Reignites Drug-Testing Debate*, ST. LOUIS POST-DISPATCH, Aug. 30, 1991, at 1A.

Therefore, O.C.G.A. section 21-2-140 restricts access to the ballot based only on the candidate's conduct.[16]

As noted above, many States vacate the office of an elected official upon his or her conviction of a felony.[17] In Georgia, a public official's conviction of a felony involving moral turpitude or of a crime in another jurisdiction that is defined as a felony provides sufficient grounds to vacate the office. GA. CODE ANN. § 45-2-1(3). Georgia's drug testing requirement for candidates does not impermissibly burden petitioners' right to obtain access to the ballot since Georgia has done nothing more than define a disability for elected office that could undeniably serve as grounds for immediate removal from office if elected.

---

[16] Because the Georgia statute does not restrict access to the ballot based on the viewpoint of the candidate, petitioners' reliance on *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) is misplaced. In *Whitcomb*, a five Justice majority struck down a portion of an Indiana candidate eligibility statute that required candidates for office to provide an affidavit, under oath, that they did not advocate the overthrow of local, state, or national governments by force or violence. Though it found the loyalty oath in violation of the First and Fourteenth Amendments, the majority expressly premised its holding on the fact that the statute regulated advocacy rather than action. *Id.* at 447, 449-50. *Whitcomb* provides no guidance in the case at bar because the Georgia drug testing requirement, unlike Indiana's loyalty oath, does not regulate advocacy.

[17] *See, e.g.*, CAL. GOV'T CODE § 3000 (West 1995); FLA. CONST. ART. 6, § 4(a) (West 1995); IND. CODE ANN. § 3-8-1-5(b)(3)(B) (West 1988); MICH. COMP. LAWS ANN. § 201.3(5) (West 1989).

Third, Georgia's drug testing requirement imposes only a minimal burden on a candidate's privacy interests. Petitioners' suggest that political candidates are not a class that has historically been regulated and, thus, maintain undiminished expectations to privacy. Pet'rs' Br. at 6. Even a cursory review of federal and state campaign finance laws as well as ballot access regulations belies petitioners' position. And, as the financial disclosure statutes starkly illustrate,[18] a candidate for public office has a diminished expectation to privacy. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (Blackmun, J., concurring); *Chandler v. Miller*, 73 F.3d 1543, 1547 (11th Cir. 1995) (noting that "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position"). A candidate's privacy interest with respect to the disclosure of personal and family income certainly equals or exceeds any asserted privacy interest a candidate may have with respect to disclosing illegal conduct.

One reason that the Court has not required heightened scrutiny of all ballot access measures is that the application of a strict scrutiny analysis would effectively tie the hands of States in their respective efforts to develop candidate qualifications. *See Burdick*, 504 U.S. at 433; *Clements*, 457 U.S. at 963. The Court has instead adopted a flexible

---

[18] Alaska's financial disclosure statute acknowledges that candidates for elected office have a diminished expectation of privacy and that the public has a right to know the candidate's financial and business interests in order to foster greater public confidence in persons seeking elected office. *See* ALASKA STAT. § 39.50.10 (Michie 1974).

standard of review which weighs the nature of the candidate's asserted interest against the interests offered by the State as a justification for the ballot access regulation. *Burdick*, 504 U.S. at 433; *Anderson*, 460 U.S. at 789. Courts applying this standard have utilized the rational basis test to evaluate the constitutionality of candidate qualifications such as financial disclosure requirements,[19] residency requirements,[20] minimum signature requirements,[21] and testing requirements.[22]

Georgia's drug testing requirement for prospective candidates imposes a *de minimis* burden -- if any at all -- upon petitioners' constitutional rights. In addition, O.C.G.A. section 21-2-140 is a reasonable,

---

[19] *Plante*, 575 F.2d at 1126-27 (rejecting constitutional attack on Florida's financial disclosure requirement for candidates and elected officials because ballot access requirement furthered important state interests).

[20] *MacDonald v. City of Henderson*, 818 F. Supp. 303, 305-306 (D. Nev. 1993) (affirming municipality's one-year residency requirement for city council candidates and finding that ordinance need only satisfy the rational basis test).

[21] *Rockefeller v. Powers*, 74 F.3d 1367, 1382 (2d Cir. 1995) (applying rational basis test to uphold New York statute that required candidates for the New York delegation to the Republican National Convention to obtain a minimum number of signatures of registered Republicans in their congressional district).

[22] *Combs v. Huff*, 858 S.W.2d 160, 163-64 (Ky. 1993) (applying rationality review to sustain Kentucky statute that required candidate's for the office of circuit court clerk to pass an eligibility examination).

nondiscriminatory restriction upon the rights of candidates and voters. Accordingly, the Court's review is limited to determining whether Georgia's drug testing requirement is rationally related to a legitimate governmental interest.[23]

II. MANDATORY DRUG TESTING OF PROSPECTIVE CANDIDATES FURTHERS TWO LEGITIMATE AND IMPORTANT STATE INTERESTS

A. Mandatory Drug Testing of Prospective Candidates Furthers the State's Interest in Preventing the Abuse of Public Trust by Elected Officials

Mandatory drug testing serves an important function in Georgia's effort to screen out prospective candidates who would be unsuitable for elective office. It is beyond peradventure that public trust is essential to the successful operation of a representative form of government. *E.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). When elected officials charged with the responsibility of writing and faithfully executing the laws violate the very laws they are

---

[23] *See, e.g., Gregory*, 501 U.S. at 470-73 (applying rationality review to uphold Missouri election law that barred candidates for the state judiciary who were over the age of 70); *Clements*, 457 U.S. at 967-68, 972-73 (finding that Texas law that prevented office holder from seeking another elected office before the expiration of his or her existing term of office imposed only a *de minimis* burden on the candidate's constitutional rights and that ballot access law was rationally related to State's interest in ensuring that office holders devote their full energies to the position they currently occupied).

sworn to uphold, it breads cynicism and weakens the body politic. *E.g., United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). Thus, it is not surprising that many States have enacted statutes vacating the office of elected officials convicted of crimes,[24] or disqualifying potential candidates because of past criminal conduct.[25] These statutes, "like all legal classifications, [are] founded on a generalization[,]" *Gregory*, 501 U.S. at 473, that excluding felons from the ranks of elective office will lessen the risk of further violations of the public trust.[26]

---

[24] *See, e.g.*, CAL. GOV'T CODE § 3000 (West 1995); FLA. CONST. ART. 6, § 4(a) (West 1995); IND. CODE ANN. § 3-8-1-5(b)(3)(B) (West 1988); MICH. COMP. LAWS ANN. § 201.3(5) (West 1989).

[25] *See, e.g.*, FLA. CONST. ART. 6, § 4(a) (West 1995); MONT. CONST. ART. IV, § 4 (1994); OKLA. STAT. ANN. tit. 26 § 5-105a(A) (West 1991).

[26] *Cf. Gregory*, 501 U.S. at 473. In *Gregory*, several Missouri state court judges challenged a Missouri law that disqualified them as eligible candidates for judgeships because of their advanced age. Missouri argued that the purpose of the law was to maintain an active judiciary that was not hindered by concerns of health or vigor. The Court agreed with the state judges that it was not necessarily true that all judges over 70 suffer significant deterioration in their performance, or that even many suffer diminished performance because of age. The Court found, however, that the "people of Missouri rationally could conclude that the *threat* of deterioration at age 70 is sufficiently great . . . that they will require all judges to step aside at age 70." *Id.* (emphasis added).

Georgia's drug testing requirement for prospective candidates serves essentially the same function. By screening from the pool of potential candidates for elective office those persons who use illegal narcotics, Georgia decreases the likelihood that public officials will be susceptible to the dangers that accompany drug use and trafficking. Elected officials who use illegal drugs are at a greater risk of extortion and blackmail than public officials who are drug free.[27] Public officials who are addicted to illegal drugs are more likely to need large sums of money to support their addictions and, thus, more likely to engage in official corruption.[28] In short, Georgia has legitimate and even compelling reasons for excluding active drug users from the universe of potential office holders.

Petitioners repeatedly argue that drug testing political candidates is unwarranted because "nothing supports the suspicion of any drug related activity among candidates."

---

[27] *E.g.*, Maya Bell, *Politician Says Tale of Sex, Crack All Lies; A Miami Mayoral Candidate Claims Criminals Are Trying to Frame Him*, ORLANDO SENTINEL TRIB., May 16, 1992, at A1 (discussing public allegations of drug use made against Miami City Commissioner and candidate for Mayor, who claimed that allegations were made by "a cadre of career criminals" who were telling "wild tales about him to extort money").

[28] *E.g.*, Arnold H. Lubasch, *Housing Aides Are Charged in Bribe Plan*, N.Y. TIMES, Feb. 10, 1989, at B1 (describing bribery charges brought against New York City Housing Inspectors who allegedly demanded money in order to support their drug addictions in return for ignoring code violations and indicating that Mayor Ed Koch announced a new drug testing program "because we now know that many of these inspectors are extorting bribes to feed their drug habits").

Pet'rs' Br. at 23. One needs only to read the morning paper to appreciate that drug use by candidates and elected officials is a matter of great concern to communities throughout the nation.[29] Nor has the problem of drug use by office holders escaped the notice of the courts.[30]

---

[29] *E.g., Cooperhill Mayor Faces Charges of Growing Marijuana*, STATE NEWS BRIEFS, July 17, 1996, at 1, *available in* LEXIS, News Library, Current File (noting that Mayor of Cooperhill, Tennessee was indicted for drug possession by grand jury shortly after presiding over ceremony for passing of Olympic torch); Maxine Bernstein, *Drug Charges Dropped Against City Worker*, HARTFORD COURANT, May 10, 1996, at B1 (describing how city councilman from Hartford, Connecticut, who had been convicted in 1990 for selling drugs but received a suspended sentence, pleaded guilty to a one count charge of possession of narcotics); *Asbury Park Press*, Mar. 3, 1996, § AA, at 4, *available in* LEXIS, News Library, Current File (indicating that Mayor of Asbury Park, New Jersey resigned last fall because of drug possession charges); Deborah Kelly, *Informer Receives 6 Months in Jail; Man Helped Police in Richardson Case*, RICHMOND TIMES-DISPATCH, Nov. 29, 1995, at B-1 (discussing drug sting operation that led to arrest of Richmond, Virginia City Councilman for selling heroin); *Mayor, Wife Face Counts in Drug Case*, ARKANSAS DEMOCRAT-GAZETTE, Apr. 20, 1995, at 4B (noting that a federal grand jury indicted the Mayor of Bradford, Arkansas and his wife for possession of 65 pounds of marijuana).

[30] *See, e.g., United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991) (affirming conviction of Mayor of the District of Columbia for possession of cocaine); *Committee on Legal Ethics of W. Va. State Bar v. Roark*, 382 S.E.2d 313 (W. Va. 1989) (approving disciplinary sanctions against attorney who was the Mayor of Charleston, West Virginia at the time that he was (continued...)

Although the fear of public condemnation may deter many public officials from using drugs, such fear would make those officials who use drugs particularly vulnerable to blackmail. Thus, Georgia is entitled to be concerned about any possibility of drug use among its elected officials even if the level of drug use may be lower than among other groups.

Petitioners apparently believe that, in order to justify O.C.G.A. section 21-2-140, Georgia must proffer empirical data that conclusively demonstrates a growing problem of drug use by office holders. Pet'rs' Br. at 23. To the contrary, the Constitution does not require a State to offer evidence in support of a ballot access regulation. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). For example, in *Munro*, the Court held that Washington state did not have to introduce evidence of actual voter confusion and ballot overcrowding to justify a statute that required minor-party candidates to receive a minimum number of primary votes in order to gain access to the general election ballot. The Court rejected such a requirement because it "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 195. The *Munro* Court held that States "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively[.]" *Id.*

There can be little doubt that drug use by elected officials is a serious problem that falls within the province of Georgia's legitimate legislative authority, and the

---

[30](...continued)
arrested and convicted for possession of cocaine).

Constitution does not require Georgia to forestall legislation until after an elected official trades a government contract to avoid public disclosure of drug use. Georgia believes that drug use by elected officials poses a sufficient threat to the public trust to warrant legislative action and petitioners cannot challenge that judgment unless the "'facts on which the classification is apparently based could not reasonably be conceived to be true.'" *Gregory*, 501 U.S. at 473 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

B. Mandatory Drug Testing of Prospective Candidates Furthers the State's Interest in the Public Accountability of Elected Officials

Mandatory drug testing of candidates for public office serves another important State interest. O.C.G.A. section 21-2-140 requires elected representatives to set the example for the general public[31] and, in particular, for the government employees that have increasingly been asked or required to participate in mandatory drug testing

[31] For instance, during the trial of Washington Mayor Marion Barry, Barry conceded that -- as mayor -- he held a position of public trust that made him a role model for the community. *Barry*, 938 F.2d at 1338. In a letter to the trial judge before sentencing, Mayor Barry acknowledged that he "'stood before the public -- before our youth -- as an example, a person that [sic] should have been a role model because he was the number-one man in the District of Columbia Government.'" *Id.* (quoting letter). Barry also admitted that, by virtue of his drug use, he had "'contributed to the anguish that illegal drugs have inflicted on this city in so many ways for so long.'" *Id.*

programs.[32] Drug testing is widespread for many categories of government employees, including law enforcement, corrections officials, and others whose duties require a high degree of integrity and protection of public safety. Georgia can reasonably ask its elected officials to meet the same sort of requirement.

Petitioners belittle the weight of this State interest and argue that symbolism cannot justify a drug testing program. Pet'rs' Br. at 20. Symbolism, however, has always been recognized as a legitimate governmental interest.[33] Indeed, one of the principal accomplishments of the 104th Congress was the passage of the Congressional Accountability Act, which applied for the first time to Congress the workplace

[32] *E.g.*, UNITED PRESS INT'L, July 20, 1988, BC cycle, *available in* LEXIS, News Library, Current File (discussing proposal by United States Senate candidate from Florida to implement a mandatory testing program for Congress and quoting candidate, a former United States Attorney who prosecuted drug lords, as follows: "[I]f Congress is going to pass any laws requiring drug testing, then it has a duty to live by the same laws and set an example"); UNITED PRESS INT'L, Feb. 17, 1987, BC cycle, *available in* LEXIS, News Library, Current File (describing proposal by Oregon state legislator to implement drug testing program for members of legislature and quoting one state senator as follows: "If we are going to require it for other groups then I feel we should subject ourselves to the same thing").

[33] *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring) (stating that "the State may properly perform a teaching function").

laws that apply to the public-at-large.[34] One of the primary reasons proffered in support of the legislation was that the Act responded to the "growing public cynicism about Congress" that had arisen, in part, because Congress had exempted itself from the laws that govern private employers.[35] The Senate Report acknowledged "the reality-of a double standard of special privileges for the legislative branch."[36] While symbolism alone may not qualify as a compelling governmental interest, it cannot be gainsaid that a State has a legitimate interest in requiring its representatives to lead by example.

Many corporations impose drug testing requirements on top executives as well as rank-and-file employees. Military drug testing programs include generals and admirals as well as privates and seamen. To exempt high-level officials from drug testing on the grounds that they are less likely to be drug users would create a double standard and undermine the morale of those employees who are subject to testing.

Georgia's drug testing requirement for prospective candidates is rationally related to the State's legitimate governmental interests of preserving the public trust and promoting public accountability. Accordingly, O.C.G.A. section 21-2-140 -- like the myriad of ballot eligibility requirements discussed above -- withstands judicial scrutiny and must be sustained.

---

[34] 2 U.S.C. §§ 1301-1438 (Supp. 1995).

[35] S. REP. No. 103-397, 103d Cong., 2d Sess. 1994, 1994 WL 548739 (Leg. Hist.), at *5.

[36] *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

Richard K. Willard
Counsel of Record
K. Lee Blalack, II
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
(202) 429-3000

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: December 10, 1996

APPENDIX A

Survey of Statutes Imposing Minimum Age Requirements for Public Office

Alabama: Ala. Code §§ 11-43C-17, 11-44-38, 11-44E-42 (1996).

Colorado: Colo. Rev. Stat. Ann. § 1-3-102 (West 1989).
Colo. Rev. Stat. Ann. § 1-4-501 (West 1996).

Georgia: Ga. Code Ann. § 45-2-1 (1996).

Guam: 5 Guam Code Ann. § 40108 (1995).

Iowa: Iowa Const. art. 3, § 5 (West 1989).

Kentucky: Ky. Rev. Stat. Ann § 160.180(2)(a) (Banks-Baldwin 1996).

Louisiana: La. Const. art. 4, § 2 (West 1977).
La. Rev. Stat. Ann. § 451 (West 1979).
La. Rev. Stat. Ann. § 2492 (West 1983).

Minnesota: Minn. Const. art. 7, §§ 1, 6 (West 1976).
Minn. Const. art. 5, § 2 (West 1976).
Minn. Stat. Ann. § 204B.06 (West 1992).

Mississippi: Miss. Code Ann. § 19-21-103 (1995).

Missouri: Mo. Ann. Stat. § 56.010 (West 1989).
Mo. Ann. Stat. § 249.140 (West 1990).

Nevada: 37 Nev. Rev. Stat. § 218.010 (1995).
Nev. Const. art. 2, § 1 (1995).

*New Hampshire:*N.H. Rev. Stat. Ann. § 655.28 (1995).
*New Jersey:*N.J. Const. art. 4, § 1, § 2 (West 1971).
*New Mexico:*N.M. Stat. Ann. § 21-13-8(B)
(Michie 1996).
New York: N.Y. Const. art. 6, § 25 (McKinney 1987).
N.Y. Jud. Law § 23 (McKinney 1983).
*Oklahoma:*Okla. Const. art. 37, §§ 5, 17 (West 1981).
Okla. Const. art. 6, § 3 (West 1981).
Pennsylvania: 25 Pa. Cons. Stat. Ann. § 2780.1
(West 1994).
Puerto Rico: P.R. Const. art. III, § 5 (1982).
Tennessee: Tenn. Code Ann. §§ 6-53-109(a),
8-18-101 (1996).
Texas: Tex Const. art. 3, § 7 (West 1984).
Wisconsin: Wis. Stat. Ann. § 8.21 (West 1996).

APPENDIX B

Survey of Statutes Disqualifying Candidates and Office Holders Because of Criminal Convictions

Alabama: Ala. Code § 11-43C-17 (1996).
Arizona: Ariz. Const. art. 7, § 2 (West 1984).
California:Cal. Gov't Code § 3000 (West 1995).
Florida: Fla. Const. art. 6, § 5(a) (West 1995).
Georgia: Ga. Code Ann. § 45-2-1(1) (1996).
Ga. Const. art. 6, § 7(a) (1996).
Illinois: 65 Ill. Comp. Stat. Ann. § 5/3.1-10-5(b)
(West 1996).
Indiana: Ind. Code Ann. §§ 3-8-1-5(b)(3),
3-8-6-12(b)(5) (West 1988).
Iowa: Iowa Code Ann. § 277.4 (West 1996).
Iowa Code Ann. § 376.4 (West 1976).
Iowa Code Ann. §§ 43.18, 43.67
(West 1991).
Kentucky: Ky. Const. §§ 145.1, 150
(Banks-Baldwin 1995).
Louisiana: La Const. art. 1, § 10 (West 1977).
Michigan: Mi. Const. art. 4, § 7 (West 1985).
Mi. Comp. Laws Ann. § 201.3(5)
(West 1989).
Minnesota:Minn. Const. art. 7, § 1 (West 1976).
Minn. Code Ann. § 351.02(5) (West 1990).

Mississippi:Miss. Code Ann. §§ 23-15-299(6), 23-15-309(4) (1995).
Miss. Code Ann. § 23-15-11 (1995).

Montana: Mont. Const. art. IV, § 4 (1995).

Nevada: Nev. Const. art. 15, § 3 (1995).
Nev. Const. art. 2, § 1 (1995).

New Jersey: N.J. Stat. Ann. § 19:4-1(6)-(8) (West 1989).

New York: N.Y. Pub. Off. §§ 3, 30(e) (McKinney 1988).

Oklahoma: Okla. Stat. Ann. tit. 26, § 5-105a(A) (West 1991).

Oregon: Or. Rev. Stat. § 206.015(1)(c) (1995).

Pennsylvania: Pa. Const. art. 2, § 7 (West 1994).
25 Pa. Cons. Stat. Ann. § 2911(e) (West 1994).

Rhode Island: R.I. Const. art. 2, § 1 (1995).

South Dakota: S.D. Codified Laws § 3-4-1(6) (1996).

Texas: Tex. Elec. Code Ann. § 141.001(a)(4) (West 1986).

Wisconsin: Wis. Stat. Ann. §§ 8.21, 17.03(5) (West 1996).

APPENDIX C

Survey of Statutes Disqualifying Voters, Candidates and Office Holders Because of Mental Incompetence

Alaska: Alaska Const. art. 5, § 2 (Michie 1996) (stating that "[n]o person may vote who has been judicially determined to be of unsound mind unless the disability has been removed").

Kentucky: Ky. Const. § 145 (Banks-Baldwin 1995) (stating that "[i]diots and insane persons" may not vote).

Montana: Mont. Const. art. IV, § 2 (1995) (disqualifying from voting any person who "is of unsound mind, as determined by a court").

Mont. Code Ann. § 13-1-111(3) (1995) (disqualifying from voting any "person adjudicated to be of unsound mind . . . unless he has been restored to capacity as provided by law").

Rhode Island: R.I. Gen. Laws § 17-14-1(3) (1988) (requiring candidate to file certification that "he or she has not been lawfully adjudicated to be non compos mentis, of unsound mind").

Texas: Tex. Const. art. 6, § 1 (West 1993) ("The following classes of persons shall not be allowed to vote in this State, to wit: . . . Idiots and lunatics.").

Tex. Elec. Code Ann. § 141.001(a)(4) (West 1986) ("To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must: . . . have not been determined mentally incompetent by a final judgment of a court.").

West Virginia: W. Va. Const. art. 4, § 1 (1996) (stating that no person is entitled to vote if they have "been declared mentally incompetent by a court of competent jurisdiction").

APPENDIX D

Survey of Statutes Requiring Judges and Prosecutors to be Lawyers and Practicing Members of the State Bar

Alabama: Ala. Code § 12-17-63 (1996).

Georgia: Ga. Code Ann. § 15-18-3(4) (1996).
Ga. Const. art. 6, § 8, ¶ I(b) (1996).

Idaho: Idaho Const. art. V, § 18 (1996).

Indiana: Indiana Code § 3-8-1-17(1) (West 1988).
Indiana Code § 3-8-1-18(2) (West 1988).
Indiana Code § 3-8-1-19 (West 1988).
Indiana Code § 3-8-1-30(4)(A) (West 1988).

Kansas: Kan. Stat. Ann. § 22a-102 (West 1995).

Louisiana: La Const. art. 5, § 24 (West 1977).
La Const. art. 5, § 26 (West 1977).

Michigan: Mi. Comp. Laws Ann. § 600.8201 (West 1987).
Mi. Comp. Laws Ann. § 730.508 (West 1993).

Missouri: Mo. Rev. Stat. § 56.010 (West 1989).

Montana: Mont. Const. art. VI, § 3(2) (1996).

Nevada: Nev. Rev. Stat. Ann. § 2.020.2 (Michie 1995).
Nev. Rev. Stat. Ann. § 252.010.2 (Michie 1995).

North Dakota:N.D. Const. art. 6, § 10 (1994).
Ohio: Ohio Rev. Code Ann. § 309.02 (Banks-Baldwin 1992).
West Virginia: W. Va. Const. art. 8, § 7 (1996).

APPENDIX E

Survey of Statutes Disqualifying Candidates for Public Office if They Occupy Elected Office or Are Seeking Another Office

Colorado: Colo. Rev. Stat. Ann. § 1-4-501 (West 1996).
District of Columbia: D.C. Code Ann. § 31-101 (1981).
Florida: Fla. Stat. Ann. § 110.233 (West 1996).
Iowa: Iowa Code Ann. § 69.2(9) (West 1991).
Minnesota: Minn. Const. art. 4, § 5 (West 1976).
Minn. Const. art. 6, § 6 (West 1976).
Montana: Mont. Const. art. VI, § 5(2) (1994).
New York: N.Y. County Law § 411 (McKinney 1991).

APPENDIX F

Survey of Statutes Conditioning Eligibility for Public Office on the Filing of a Financial Disclosure Statement

Alaska: Alaska Stat. §§ 39.50.010, 39.50.020 (Michie 1996) (requiring candidates for state elective office to file a personal financial disclosure statement at the time of filing a declaration of candidacy).

Arizona: Ariz. Rev. Stat. Ann. §§ 38-542, 38-543, 38-544 (West 1996) (stating that "[a] candidate for public office . . . shall file a financial disclosure statement covering the preceding twelve month period" and subjecting candidate to criminal penalties for knowingly failing to file).

Colorado: Colo. Rev. Stat. Ann. §§ 1-45-105, 24-6-202 (West 1989) (requiring candidates to file a detailed disclosure of personal income and finances within ten days of becoming a candidate and stating that "[f]ailure of any person to file . . . shall result in the disqualification of such person as a candidate").

Florida: Fla. Stat. Ann. §§ 99.061, 112.3145 (West 1996) (requiring "each candidate for a constitutional office" to file a "full and public disclosure of financial interests", including detailed reporting of personal income and real estate interests).

Georgia: Ga. Code Ann. § 21-5-50 (1996) (requiring candidates to file disclosure statements revealing sources of personal income, including honoraria, fiduciary positions held by the candidate, and ownership interests that exceeds 10% of any enterprise).

Hawaii: Haw. Rev. Stat. Ann. § 84-17 (Michie 1996) (requiring candidates for state elective offices or the constitutional convention to file financial disclosure requirements that include the financial interests of the candidate and members of the candidate's household such as all sources of income exceeding $1,000 and every ownership or beneficial interest in property valued in excess of $5,000).

Haw. Const. art. 14 (Michie 1996) ("The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees . . . to make public financial disclosures.").

Iowa: Iowa Code Ann. § 68B.35 (West 1996) (requiring candidates for state and local offices to file financial disclosure requirements within 30 days of filing nomination papers and listing all sources of income in excess of $1,000).

Kentucky: Ky. Rev. Stat. Ann. § 65.003 (Banks-Baldwin 1996) (requiring all candidates for state offices and municipal offices to file financial disclosure statements).

Maryland: Md. Code Ann. State Gov't §§ 15-601, 15-605 (1995) (providing that "[i]f a [financial disclosure] statement . . . is overdue and is not filed within 20 days after the candidate receives . . . written notice of the

failure to file, the candidate is deemed to have withdrawn the candidacy").

New Jersey: N.J. Stat. Ann. §§ 19:44B-1, 19:44B-2, 19:44B-8 (West 1989) (providing a civil penalty of up to $2,000 if candidate fails to file a financial disclosure statement detailing personal sources of income and sources of income of members of his household).

New Mexico: N.M. Stat. Ann. § 10-16A (Michie 1995) (requiring candidate to file, at time of declaring candidacy, a financial disclosure statement listing all sources of income for the candidate and spouse as well as real estate holdings in New Mexico).

Nevada: Nev. Rev. Stat. §§ 281.561, 281.571 (1996) (stating that, in order to qualify as a candidate for public office, person must file a financial disclosure statement setting forth details of personal finances and business interests).

New York: N.Y. Gen. Mun. Law § 812 (McKinney 1996) (requiring each candidate for local elected office to file financial disclosure statement which contains detailed reporting requirements on sources of personal income, real estate holdings, professional licenses, and interests in securities).

Ohio: Ohio Rev. Code Ann. § 102.02 (Banks-Baldwin 1996) (requiring candidates for state and federal offices to file with state ethics commission detailed financial disclosure statements that list "the amount of every source of income received" from various sources of business activity).

Oklahoma: Okla. Stat. Ann. tit. 51, §§ 319, 321 (West 1996) (requiring candidates for state and federal offices to file at least 10 days before the last day to declare candidacy a financial disclosure statement listing in detail the sources of income including honoraria and interests in securities).

Pennsylvania: 65 Pa. Cons. Stat. Ann. §§ 404, 405 (West 1996) (providing that all candidates for state or local office must file a statement of financial interests before the last day to file a nominating petition and requiring disclosure of direct and indirect sources of income exceeding $1,000, gifts valued in excess of $200, and loans and others debts owed by the candidate).

West Virginia: W. Va. Code §§ 3-1A-7, 6B-2-6 (1996) (requiring candidates for any state, county or municipal office, or school board to file a financial disclosure statement with the state ethics commission).